REPORTS

OF

CASES

DETERMINED

IN THE

Court of Sudder Dewanny Adawlut,

WITH

AN INDEX TO THE PRINCIPAL MATTERS.

APPROVED BY THE COURT.

VOLUME VII.

PART V.

CONTAINING

CASES OF 1845.

CALCUTTA:

BENGAL MILITARY ORPHAN PRESS.

1846.

ADVERTISEMENT.

To explain the appearance of Part 5, Volume VII. of the Select Reports in a different form from that of previous years, it is necessary to state that the present selection is but a reprint, accompanied by notes, of such of the decisions published monthly, as, containing constructions of law, or being illustrative of points of practice, are adapted to serve as precedents to the lower courts.

AN INDEX

TO

THE PRINCIPAL MATTERS.

BHOG RAJ THAKOR, (DEFENDANT,) APPELLANT,

(HURNATH CHOWDREE, ABSENT,)

versus

FUTTEH CHAND SAHOO, (PLAINTIFF,) RESPONDENT.

Special Appeal from a decision of the Principal Sudder Ameen of Tirhoot.

1845.

February 17.

Construction 588, (para. 4,) which rules that a defendant may legally alienate his property prior to proclamation of attachment under Clause 2, Section 5, Regulation II. 1806, held to be applicable only to *bonâ fide* sales.

Messrs. RATTRAY, BARLOW, and GORDON:

A SPECIAL appeal was admitted by Mr. Tucker, on the 21st November 1843, on the ground that the principal sudder ameen's decision of the 20th April 1843, in which a sale made by Hurnath Chowdree to Bhog Raj Thakor was declared illegal, was opposed to the Court's Construction, dated the 8th April 1831, No. 588.

We are of opinion that the decision of the principal sudder ameen must be upheld. The construction referred to by Mr. Tucker supposes a *bonâ fide* sale to have been made. The principal sudder ameen declares in the case that no sale was in reality made, and that it is merely a plea set up collusively by the alleged seller and buyer, in order to prevent the sale in satisfaction of decree. Under Act III. of 1843, this Court cannot interfere with what has been established as fact in the courts below; and the opinion of the principal sudder ameen, with respect to what is the fact, must be held to overrule that of the sudder ameen, who possesses an inferior jurisdiction.

The Court reject the appeal with costs, confirming the decree of the principal sudder ameen.

REMARKS.

A case of fictitious sale, prior to the issue of proclamation of attachment under Regulation II. 1806, was reversed. See case of Baboo Odyet Nurrain Sing *versus* Juggomohun Doss, decided January 8th, 1844, reported at page 147, Volume VII. Sudder Dewanny Adawlut Reports.

The Sudder Dewanny Adawlut decreed the legality of a *bonâ fide* sale, prior to attachment of property under Regulation II. 1806. See case of Baboo Odyet Nurrain Sing *versus* Juggomohun Doss, decided January 8th, 1844, reported at page 147, Volume VII. Sudder Dewanny Adawlut Reports.

RAJ KOONWAREE KIRPA MAYEE DIBEEAH,
(PLAINTIFF,) APPELLANT,

versus

RAJAH DAMOODHUR CHUNDER DEYB, AND OTHERS,
(DEFENDANTS,) RESPONDENTS.

Special Appeal from a decision of the Judge of Nuddeah.

Messrs. REID, DICK, and GORDON:

1845.

February 20.

According to Hindoo law, property derived by a mother from her son, cannot be succeeded to by her daughter, the sister never being heir of the brother.

THE plaintiff sues for a portion of an allowance,—granted by her father's grandfather to his younger sons, in lieu of any share in his landed property, left wholly and solely to his eldest son,—in succession to her mother, deceased, who succeeded her son.

The defendants contend that the allowance in question was not intended for females, as is evident from the deed granting the allowance. In it no mention is made of the grantor's own daughters then alive, and no provision made for any of three daughters of one of his deceased sons, though a portion of the allowance is granted to the adopted son of that very son.

The principal sudder ameen, on the 8th July 1838, dismissed the claim on the reasoning in the defence; and the judge, concurring in opinion with the principal sudder ameen, confirmed his decision in appeal, on the 10th September 1842.

The Judges of this Court admitted the special appeal, on the 4th January 1843, not being satisfied with the grounds on which the lower courts decided; the point under discussion being novel.

The Court find that the property in question is decidedly heritable, having in several instances been inherited in the usual manner. But, as Musst. Neel Sursuttee inherited from, and through her son, and not from her husband,—according to the Hindoo law of inheritance, her daughter is not heir after her; the sister never being heir of her brother.

The Court consequently uphold the decisions of the lower courts and dismiss the appeal with costs.

REMARKS.

This suit originated in the following circumstances.

Raja Kishen Chund,* zumeendar of Nuddea, left all his property to his eldest son, with pecuniary provisions for his other sons, to be paid to them out of the proceeds of the estate. On its sale for arrears of revenue on the 29th of December 1812, the Sudder Dewanny Adawlut directed the attachment of two lacs of

* See the case of Eshanchunder Rai *versus* Eshorchunder Rai, decided February 23rd, 1792 Sudder Dewanny Reports, Vol. I. page 2. Also the case of Raja Grischund Rai *versus* Sumbhoochund Rai, decided May 9th, 1806, Sudder Dewanny Reports, Volume I. page 133.

rupees out of the proceeds of sale for payment of the above allowances, which sum having been invested in Government paper, the interest of it was devoted to the purpose. Subsequently the sum was reduced to one lac of rupees, the deposit of that amount being deemed sufficient. The parties who latterly were entitled to the interest on account of their allowances, were Raja Bejoy Chunder Deb and Ranee Neel Sursuttee, who shared equally. On the death of the latter, her portion reverted to the heirs of the former, and it was to have it continued to herself that her daughter, the plaintiff, brought this action.

Raj Koonwaree Kirpa Mayee Dibeeah v. Rajah Damoodhur Chunder Deyb.

RANA KAMSHANA, (PLAINTIFF,) APPELLANT,

versus

GOUR SING AND SOORJ SING BURKUNDAUZE, (DEFENDANTS,) RESPONDENTS.

Special Appeal from a decision of the Principal Assistant at Goalparah.

1845.

March 13.

Slander against a female of good character, although not of that rank in life which renders her seclusion necessary, may be visited by damages in a civil court.

Messrs. TUCKER, REID, and BARLOW:

IN this case the plaintiff sued for damages, in consequence of the defendants having charged his wife with theft before the police, and causing his house to be searched. The sudder ameen of Goalparah gave a decree in plaintiff's favor for 64 rupees as damages. On appeal, the principal assistant under the commissioner of Assam, stationed at Goalparah, reversed this order, because the plaintiff's wife was a woman who appeared in public in the bazar, at the market places, &c., stating that the plaintiff should have complained in the *foujdaree* court.

A special appeal was admitted by Mr. J. F. M. Reid, on the 10th February 1844, on the following grounds:—"As this decision lays it down as a rule that slander against a female, who is not of that rank in life which renders her seclusion necessary, though undoubtedly of good character, cannot be visited by damages in a civil court, and that a party falsely accused in a criminal court can only sue in that court for the punishment of the false accusers, and not for civil damages; I admit a special appeal to try these points."

The Court are of opinion that the principle laid down by the principal assistant, in appeal, is equally opposed to law and justice. Annulling the decision of the principal assistant, they direct that the case be returned to him for disposal on its merits.

RANEE CHUNDER MONEE, WIDOW OF RAJAH RAM DASS, AND MOTHER OF KALEE KISHEN SING, MINOR, (PLAINTIFF,) APPELLANT,

versus

RAJAH BIRJNATH SING, RAJAH RAM LOCHUN, AND OTHERS, ABSENT IN APPEAL, (DEFENDANTS,) RESPONDENTS.

Special Appeal from a decision of the Judge of Mymensing.

Messrs. TUCKER, REID, and BARLOW:

1845.

March 20.

The rules of a positive enactment, supersede the tenets of Hindoo law.

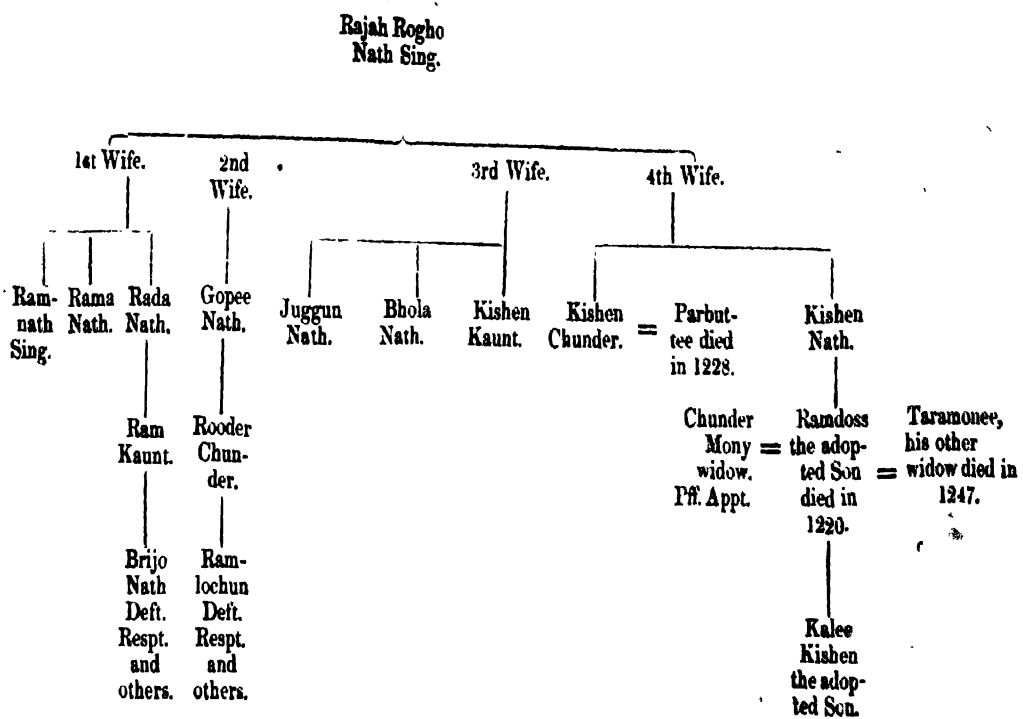
A claim to recover possession of property, founded upon adoption which had been postponed beyond 12 years, was dismissed.

THIS suit was instituted, on the 19th March 1841, corresponding with 7th Chyte 1247 B. S., by the plaintiff, on the part of her adopted son, Kalee Kishen Sing, for succession to the property left by Kishen Chunder Sing, the brother of her husband's father. The accompanying genealogical table shews the relationship existing between the parties. Kishen Chunder and Kishen Nath Sing, two full brothers, were equal sharers, 4½ gundahs each, in the 2 annas share of pergunnah Sooseraj, the property of their father Roghoonath Sing. Kishen Chunder died leaving a widow, Parbuttee, who succeeded, for her lifetime, to her deceased husband's share, and died herself in 1228 Srabon. Ram Dass Sing, son of Kishen Nath, plaintiff's husband, died in 1220 B. S., without leaving any children by either of his wives, but having previously granted permission to them to adopt a son. Taramonee died in 1247; and in Phalgoon of the same year plaintiff adopted Kalee Kishen.

On the demise of Parbuttee in 1228 B. S., the 4½ gundas share of Kishen Chunder Sing, her husband, was taken possession of by the heirs of Roghoonath Sing's other sons. The present suit is to oust them in favor of plaintiff's adopted son.

The principal sudder ameen, on the 27th May 1842, and the judge, on the 22d May 1843, dismissed the claim under the law of limitation, considering the cause of action to have arisen on the death of Parbuttee in 1228; and a special appeal was admitted, on the 19th December 1843, to try whether this was good law, the adoption not having taken place till 1247 B. S.

If this case were to be decided solely on the principles of the Hindoo law, the Court would have to determine in the first instance whether there be any, and, if any, what limitation to the adoption of a son by a Hindoo widow. In this case, however, the plaintiff, assuming the right to adopt, comes into court to claim, on behalf of her adopted son, the restoration of property which passed, in consequence of her failing to adopt, into the possession of other branches of the family, 19 years before the institution of


Rajah Rogho Nath Sing.
1st Wife.
2nd Wife.
3rd Wife.
4th Wife.
Ram-nath Sing.
Rama Nath.
Rada Nath.
Gopee Nath.
Juggun Nath.
Bhola Nath.
Kishen Kaunt.
Kishen Chunder.
=
Parbut-tee died in 1228.
Kishen Nath.
Ram Kaunt.
Rooder Chun-der.
Chunder Mony widow. Pff. Appt.
=
Ramdoss the adop-ted Son died in 1220.
=
Taramonee, his other widow died in 1247.
Brijo Nath Deft. Respt. and others.
Ram-lochun Deft. Respt. and others.
Kalee Kishen the adop-ted Son.

he suit, and up to the present time has been held by them under *bonâ fide* titles. Hence, it becomes a question whether the rules of limitation laid down in section 14, Regulation III. of 1793, do not bar this suit, *quoad* the possession of the disputed property.

Without reference to the validity or otherwise of the adoption, (which took place 27 years after the demise of plaintiff's husband,) the Court are of opinion, to quote the words* of Sir William Hay Macnaghten, that "there can be little doubt that the rules of a positive enactment supersede the tenets of Mahomedan law," and also, as the Court hold, of Hindoo law. The claim therefore for possession cannot be entertained under the law of limitation. In confirmation of the lower court's orders, the appeal is dismissed with costs.

GOPAL DAS SINDH, MAUN DATA MAHAPATER, (DEFENDANT,) APPELLANT,

versus

NUROTUM SINDH, BUNMALEE SINDH, RAM SINDH, AND NARAIN SINDH, (PLAINTIFFS,) RESPONDENTS.

Special Appeal from a decision of the Judge of Zillah Cuttack.

1845.

March 26.

It is no bar to the division amongst heirs, of an estate the property of a Hindoo family, that it formerly belonged to one, in which the custom of succession by the eldest son obtained.

Mr. DICK:

THE plaintiffs, respondents, sued the defendant, appellant, for their shares in a landed estate called *tuppa* Malinge, purchased by their father, and for usufruct during dispossession. The defendant, appellant, admitted the purchase of the property in question by their and his father; but denied their claim to share in it, their father having by deed left the whole of the estate indivisible to him, as his eldest son; that afterwards their uncle, his father's brother, gave up his portion in the estate, receiving the price of it, as it had been purchased by him and their father conjointly. In proof of which, he produced a deed of arbitration of 15th Ughun 1238 Umlee, in which a former deed of arbitration is mentioned, but which, and a deed of relinquishment of claim, were not filed, being on *taal putr* (palm leaf) and unstampt. And subsequent to that, before a *punchayet*, the plaintiffs, respondents, gave him another deed of relinquishment of all claim, which he also filed. He further asserted, and produced witnesses residing on the estate to prove, that the property had always been indivisible in the family of the original proprietors, whose eldest son alone inherited, and took the title of Maun Data Mahapater;

* Vide note, page 286, Mahomedan Law.

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—that his father took up the title, and that he, appellant, likewise registered his name as proprietor, in the collectorate, with the title affixed, and had been alone in possession since 1225, when his father died; two of his brothers, the plaintiffs Bunmalee and Narain, acting as his *surburakars*.

The principal sudder ameen, disbelieving the documents of defendant, appellant, and assuming the estate to be divisible, because under the revenue settlement, and because it was a purchase, and sole heritage, no family usage of the parties, decreed the claim. The judge, in appeal, on much the same grounds, dismissed the appeal.

A special appeal was admitted in this Court, on the ground of usufruct having been improperly decreed, without specification of date of dispossession, and not included in the amount at which the suit was laid.

The plaintiffs, respondents, all defaulted by non-appearance; but another person, alleging himself to be a purchaser from them of the shares decreed to them, petitioned to be allowed to defend the suit in their stead.

The case was first brought to a hearing before Mr. Dick, who referred it to a full sitting—and the respondents were allowed to appear by their pleader.

The respondents claim on the Hindoo law of inheritance. The appellant denies their claim on four grounds:—1st. The devise of the estate to him solely by his father. 2d. The relinquishment of all claim to it by the respondents. 3rd. His sole right to it by descent, according to local custom, under section 36, Regulation XII. 1805. 4th. Under the law of limitation, he having been in sole possession upwards of 12 years before institution of suit. The appellant has been unable to establish his first allegation—the will of his father being on *taal puttur*, or palm leaf, and unstampt, and therefore not filed. He has also failed in proving satisfactorily his second ground, from unusual irregularities and omissions in the execution of the deed of relinquishment filed. His third ground, I consider valid and fully borne out. It is in evidence that the estate descended indivisible in the time of the original proprietors, whose eldest son took it alone, and assumed the title of it of Maun Data Mahapatur; and not a particle of evidence in contradiction has been adduced. Again, the father of the contending parties, on purchasing the property, assumed the customary title, and the uncle who was in partnership with the father, when the estate was purchased, gave it up wholly to the appellant after the father's decease, taking other property and money instead of any share in it. Appellant was admitted to be sole proprietor of it by one of the respondents, Bunmalee, before arbitrators; and he registered his name in the collectorate as sole proprietor, with the customary title affixed. All these facts evince incontestibly what the local custom was, and how considered by the father, the uncle, and the brothers, until the disagreements in 1247 Umlee. The law refers expressly to

local custom, something the very reverse of gavelkind in England, and not to *family usage* as the lower courts have considered it. The family usage, therefore, of the contesting parties has nothing whatever to do with the question at issue;—and, in the province of Cuttack, the law includes all estates in which the custom has prevailed; consequently, the objection of the principal sudder ameen, from the estate being under revenue settlement,. is irrelevant and futile. The appellant's fourth plea, I also consider valid. He has shewn that he registered his name as sole proprietor, with the customary title of the estate affixed, in the collectorate in 1233;—that his brother Bunmalee, one of the respondents, acted for him before arbitrators duly authorized by the magistrate, and declared before them that he was in sole possession;—that another brother of his, Narain, acted as one of his servants in the estate to collect the rents, and all this on indubitable documents; while the respondents have produced not a tittle of credible evidence to evince that they ever held possession as shareholders. I think all this, coupled with the fact of the custom of the estate, which must not be lost sight of, clearly shows sole and undisturbed, good, and admitted by the adverse party, possession for upwards of 12 years previous to the setting up the claims in suit. I am therefore decidedly for rejecting the claims, reversing the lower court's decision, and decreeing the appeal with full costs.

Messrs. Reid and Gordon:

The respondents, four younger sons of Jugoo Sindh Mandhata Mahapater, sued the appellant, their elder brother, for possession of 1-6ths, or 10 annas, 13 gundas, 1 cowry, 1 krant of *pergunnah* Mulunch, *pergunnah* Bunchas, purchased by their father on 14th September 1814, or 22d Bhadoon 1221 Umlee, from Sheikh Fukeeroolla, stating the remaining shares to belong, 1-6th, or 2 annas, 13 gundas, 1 cowry, 1 krant, to the appellant, and a like share to Sham Churn Sindh, their second brother, who did not join them in the suit. They laid their suit at Rs. 1386-10-8, the *sudder jumma* of the share claimed, and prayed to be allowed to recover mesne profits.

The appellant, Gopal Sindh, resisted the claim on the following grounds. He asserted that the *pergunnah* was purchased by his father, as stated. That in 1224 Umlee, his father executed on *tar* leaf a deed of partition, or *tukseemnameh*, in the presence of several respectable persons, assigning the pergunnah in question, as his self acquired, not hereditary property, to himself, as the eldest son, and providing that his brother, Beer Buder Sindh, and his sons, should receive shares in the personal property, and a proportional share of the value of the estate from the appellant, and deposited the deed with Shistee Punda. That on his father's death in 1225 Umlee, he had his name duly registered, without any opposition on the part of his uncle and brothers, as would have been the case had they been entitled to

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share in the *pergunnah*. That in 1237, his uncle took his share of the personal property, and executed a deed relinquishing his claim to share in the estate; and that in 1244 the defendants also, after their dispute had been referred to arbitrators, executed a deed relinquishing their claim. He also asserted, that the estate had always been held by the former Hindoo proprietors, prior to the acquisition of it by Fukeeroolla, as a *raj* and indivisible estate, devolving on the eldest son, or male heir, consequently that the division thereof was barred under section 36, Regulation XII. 1805.

Sham Churn Sindh, the second brother, put in a petition, as a third party, denying the right of the defendant to hold the estate as indivisible.

The principal sudder ameen of Cuttack, Moolvee Gholam Russool, before whom the case came on, observed that it was proved by evidence that, up to 1247, the plaintiffs, the defendant, and the third party, sons by the same mother, had joint possession, and that defendant had failed to prove that the estate was indivisible under the old *zumeendars*; and that it was neither a *jungle mehal*, nor a hill estate, nor a tributary one, that it should be indivisible under Regulation XII. 1805; that, it being a regular assessed estate, there was nothing to prevent a division; and, even admitting it to have been indivisible under the old *zumeendars*, when it was by them sold to Fukeeroolla the custom would no longer hold. He further observed that the *tukseemnameh*, alleged to have been executed by the father of the parties, had not been filed; and, for the reasons stated in detail in his decree, considered the deed of renunciation filed by the defendant as unworthy of credit. Deeming, therefore, the plaintiffs entitled to their respective shares, he decreed in their favor on the 7th October 1841, awarding them possession thereof, with mesne profits, during the period of dispossession, and costs.

The case having been brought by appeal before Mr. H. B. Brownlow, judge of Cuttack, he, for reasons similar to those urged by the principal sudder ameen, confirmed his decision on the 19th March 1842, and dismissed the appeal with costs.

Gopal Sindh Mandhata, still dissatisfied, applied to this Court for a special appeal, which was admitted by Mr. Reid on the 21st June 1842, because the suit for possession of the land and mesne profits had been laid at the amount of the *jumma*, without any additional valuation on account of mesne profits.

Though a special appeal was admitted in this case, only on a point foreign to the merits, it is necessary, according to the practice that prevailed in this Court, prior to the enactment of Act III. 1843, to deliver judgment on the whole case. That case comprises the following points. 1st. What was the custom, in regard to succession, of the Hindoo family, who formerly possessed the estate, which forms the subject of the present suit? 2d. Supposing that custom to have been succession of the entire estate by the eldest son, would that bar *division*, in the event of the estate pass-

ing to another Hindoo family, in which the practice of division existed? 3d. Admitting that the practice of indivisibility in the former family does not bar division in the latter, and that there are circumstances in the present case which shew that division is the rule in the family, what contingency alone would warrant the Court to award the whole estate to the eldest brother, and does that contingency exist, or not? With respect to the first point, it may be admitted, that non-division was the practice. Neither party denies it, and the witnesses on both sides speak to the fact as indisputable. With respect to the second point, the law quoted in section 36, Regulation XII. of 1805, is silent; but the absence of any prohibition, and the spirit of Regulation X. of 1800, taken in connection with Regulation XI. of 1793, and with what seem to be the dictates of reason, lead us to pronounce a decided opinion, that a former practice of non-division does *not* bar the practice of division, in the case supposed. That the legislature had no wish strictly to enforce the rule of indivisibility in succession, is plain from this, that even in those cases where this rule obtained, a proprietor might legally divide his property by will. This is clear from the wording of section 2, Regulation X. of 1800. But if the custom of indivisibility might be broken through, even in those families, where it heretofore prevailed, what object could the legislature have in interfering with the practice of division, known to obtain in any family? With respect to the third point, there can be no doubt, whatever, that division is the rule in the family, of which the respondents and the appellants are members. The appellant admits in his pleadings, that the property, which forms the subject of the present suit, was bought jointly by his father and uncle, and that this latter remained in the joint possession of his share, long after the death of his brother, renouncing his claim at last, to the appellant, for an equivalent. In like manner, it is admitted, that the respondents were to receive compensation for their shares. Under these circumstances, we are clearly of opinion, that no court ought to award possession of the whole estate to the eldest brother, to the exclusion of the younger brothers, unless there should be satisfactory evidence to shew, that their father had disposed of the property in this manner, or that the younger brothers had conveyed their rights in the property to the appellant. As to the first supposition, there is no proof whatever. Mention, no doubt, is made, by the appellant, of a deed of allotment, executed by his father, before his death, by which he (the appellant) was to get the whole of the disputed property, his uncle and brothers receiving an equivalent for their shares. But this deed is not forthcoming; and the execution of such a deed is, to our minds, in the highest degree improbable. It will be observed, that the person alleged to have executed this deed, had no right to do so, without the consent of his brother, who possessed nearly a half of the property about to be disposed of. Under these circumstances, if a transaction of this kind had taken place,

father's death up to the year 1233, when their uncle, in lieu of his share of the disputed property, received another estate, called *talooken* Nurainpoor, which all had held in joint property. It is remarkable, that the appellant no where, in his pleadings, denies this specific fact, which we think bears the impress of truth; for if Nurainpoor had not been joint property, or if it had not been transferred, as alleged, the disproof of the double allegation, would have been easy. Accordingly, we have no faith in the alleged deed of renunciation by the uncle in favor of the appellant; and it is a curious circumstance that this deed has not been produced. But however the matter may stand, as between the appellant and his uncle, nothing short of full legal proof of the renunciation of their rights, by the younger brothers, can deprive them of those rights. It is true, that the name of the eldest brother alone was registered in the book of mutations, in the collector's office; but we are of opinion, that this was with the consent of the younger brothers, who did not on that account lose their right of property in the estate, but on the contrary received possession, in support of their right, of the original deed of sale executed in their father's favor. We accordingly reject the appeal, with costs, confirming the decrees of the courts below, with the exception of those parts which award mesne profits. As this part of the claim was not covered by a proper stamp, we can only decree mesne profits from the date of the principal sudder ameen's decision.

RAM RAM BEISH, (PLAINTIFF,) APPELLANT,

versus

BIRJ MOHUN DUTT, AND OTHERS, (DEFENDANTS,) RESPONDENTS.

Petition of Ram Ram Beish, of the 29th May 1844, *for the admission of a Special Appeal from a decision of the Principal Sudder Ameen of Mymensingh, under date the 28th February* 1844, *reversing that of the moonsiff of Mymensingh, under date 23d May* 1843.

MR. BARLOW:

1845.

March 26.

A suit was remanded because the requirements of Act XII. of 1843, had not been fulfilled

THE plaintiff sued his nephew Bidenath Beish, and Birj Mohun Dutt and others, to recover possession of 2 annas of 12 annas, (divided into 16 annas) of *talook* Bonjais, and also 2 annas of a *jote* in village Kunchunpore, sold by his nephew,—a sharer to the extent of 6 annas only;—who, it is alleged however, sold his own 6 annas, and the above 2 annas disputed, to Birj Mohun and others. The defendants Birj Mohun and others, pleaded they bought the 8 annas from Bidenath. Bidenath, in his answer,

Ram Ram Beish *v.* Birj Mohun Dutt.

states the purchasers forcibly took from him a deed of sale of the 8 annas, although he, Bidenath, had only a 6 annas share.

The moonsiff, after full enquiry, and, so far as it would appear, on sufficient grounds, decreed in favor of the plaintiff, detailing, at length, the grounds of his decision above quoted.

The principal sudder ameen reversed this judgment in *general* terms, saying, "it appears, from the papers, that Bidenath had 8 annas share, and sold it to the other defendants."

Under Act XII. of 1843, he should have been more explicit, and pointed out on what documents, and what proofs, he grounded his decision. A sweeping general reversal, such as that passed by the principal sudder ameen, can hardly be called a judgment, and is opposed to the practice of the courts. On this account I admit a special appeal.

Ordered accordingly, that the case be restored to the principal sudder ameen's file, and that he be instructed to record fully, and distinctly, the grounds of his decision.

TARA CHAND BUTTACHARJE, (PLAINTIFF,) APPELLANT,

versus

RAMJYE DUTT, AND OTHERS, (DEFENDANTS,) RESPONDENTS.

A Special Appeal from a decision of the Principal Sudder Ameen of East Burdwan.

Mr. REID:

1845.

April 19.

In a case in which a *razeenamah* and *solehnameh* were executed by both parties, a decision in conformity therewith, although in reversal of the judgment of the lower court, was passed by a single judge of the Sudder Dewanny Adawlut.

THE plaintiff sued the defendants, in the zillah court of East Burdwan, on the 9th November 1842, to obtain possession of 137 beegahs of *malgoozaree* land, and recover the value of the crops thereof, laying his suit at Company's rupees 794-5-0. The sudder ameen, on the 13th December 1843, passed a decision, decreeing possession of the land and a portion of the crops claimed, to the plaintiff. Ramjye Dutt appealing from this decision, it was reversed by the principal sudder ameen, on the 16th May 1844. The plaintiff, dissatisfied with this decision, applied to this Court on the 2d August 1844, for a special appeal.

On the 10th September 1844, the plaintiff filed a *razeenameh*, and the defendant, Ramjye Dutt, a *solehnameh*, by which it was agreed that the plaintiff should pay to Ramjye Dutt the sum of 75 rupees, and that the land decreed by the sudder ameen should be given up to the plaintiff, and that each party should pay his own costs.

The case was taken up this day in consequence of a petition of the plaintiff; and one Chundee Churn Rai put in a petition, claiming the contested land under a purchase from Ramjye Dutt, alleg-

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ing that the compromise was collusive in order to defraud him, and praying that the petition for a special appeal might be refused.

Under these circumstances it is merely necessary to provide for the parties regularly before the Court, as the decision will merely affect them, viz., the plaintiff and defendant. It cannot affect Chundee Churn Rai, who is not a party to the suit, and must therefore be left to seek his remedy by a regular suit.

It is accordingly ordered, that the special appeal be brought regularly on the file; and this having been done, that, in conformity with the *razeenamehs* and *solehnamehs*, the decision of the principal sudder ameen be reversed; that of the sudder ameen, as regards possession of the contested lands, affirmed, and as regards the award of a portion of the crops, reversed; and that both parties pay their costs in all the courts.

REMARKS.

See the case of Prannath Chowdhuri, for self and minor nephew Kasheenath Chowdhuri, *versus* Chundramuni Devi, guardian of Radhamohun Ray, son of the late Brijmohun Ray, and Fazil Khan *versus* the same respondent, reported at page 328, Volume V. of the Sudder Dewanny Adawlut Reports.

RAJAH MODE NARAIN SINGH. (PLAINTIFF,) APPELLANT,

MUSST. MAN KOONWUR AND TEK KOONWUR, (DEFENDANTS,) RESPONDENTS.

Petition of Rajah Mode Narain, of the 11th March 1844, for the admission of a Special Appeal, from a decision of the Additional Judge of zillah Behar, under date the 12th December 1843, affirming that of Mahomed Ibrahim, Sudder Ameen of that district, under date 1st September 1843.

1845.

April 26.

Messrs. TUCKER, REID, and BARLOW:

An appellate court should not dictate to a lower court what decision it should pass.

THIS suit was instituted by the petitioner to recover a balance of rent, alleged to be due from the defendants, and also to cancel a *mookurrurree* lease, under which they held the lands. The suit was laid at Company's rupees 109-5-9, the amount balance said to be due.

The case was tried, in the first instance, by the sudder ameen, who gave a decree for a portion of the balance claimed; but dismissed the claim, as respected the annulment of the *mookurrurree* lease, on the ground that a balance of rent was no legal ground for doing so. An appeal was preferred to the additional judge, who considering that the question of *mookurrurree* ought to be enquir-

Rajah Mode Narain Singh v. Musst. Man Koonwur.

ed into, actually decided that it was a good *mookurrurree*, and remanded the case back to the sudder ameen, with orders to decide accordingly, and to nonsuit on the point of balance of rent, with reservation to the plaintiff to sue separately for the same.

In pursuance of these orders, the sudder ameen decided, as directed, though protesting against the right of deciding according to his own judgment being invaded. This second decision was affirmed on appeal to the additional judge.

The Court consider the act of the additional judge, in dictating to the sudder ameen what decision he should pass, as essentially vitiating the entire proceedings; nor can the Court see any necessity for such proceeding, as the first decision of the sudder ameen being in appeal before the additional judge, it was competent to that officer to dispose of the case himself, in any manner he deemed proper. Under these circumstances, the Court quash the whole of the proceedings in this case, and remand it to the judge who will again refer it for trial to the sudder ameen, who will dispose of it according to his own judgment.

RAJAH LUKHEE NARAIN RAY, (PLAINTIFF,) APPELLANT,

versus

MUDDEN MOHUN ADHIKAREE, AHSAN ALLAH KHAN, AND OTHERS, (DEFENDANTS,) RESPONDENTS.

Regular Appeal from a decision of the Principal Sudder Ameen of Midnapore.

Messrs. TUCKER, REID, and BARLOW:

1845.

May 5.

Damages were awarded against a party for having falsely charged the plaintiff with *dacoity*; but a police *darogah*, against whom they were also sought, having acted legally upon that party's information, was exonerated.

THE plaintiff, on the 22d September 1840, brought this action against the defendant Mudden Mohun, and Ahsan Allah, a police *darogah*, and others, for damages to the extent of ten lacs of rupees, alleging that Mudden Mohun, on the 6th May 1835, had falsely charged him with *dacoitee*, and that the *darogah* had in violation of the magistrate's order searched his house.

The defendant, Mudden Mohun, answers, plaintiff is at enmity with him, because he is a *moktear* of Rooder Narain, who claimed to be adopted son of Anunderam Roy, on whose part he conducted some cases against plaintiff in the civil court. Defendant states he was absent from home on the night of the *dacoitee*; but on hearing of it returned, and in his deposition before the *darogah* charged plaintiff and others as having been the originator and perpetrators of it. He also adds that the *rajah's* natural father and relatives have been apprehended on similar charges in other cases.

The principal sudder ameen, on the 14th June 1842, dismissed the suit, because the *rajah's* appeal for redress to the commissioner was rejected; because he did not trust to copies of proceed-

Rajah Lukhee Narain Ray *v.* Muddun Mohun Adhikaree.

ings in the *foujdaree* court; and because he was of opinion the *rajah* had not in any way suffered in character, in consequence of the charge which had been preferred against him.

It is clearly proved by the record that the defendant, Mudden Mohun, did charge the plaintiff with *dacoitee*. The magistrate, in his proceedings of the 3d July 1835, released all the parties charged, and, being of opinion that no *dacoitee* had in fact occurred, caused it to be struck out of the list of offences reported. The *durogah* does not appear to have exceeded the power with which the police are invested in such cases. The plaintiff has made use of no measured terms in his plaint towards the defendant, and took no steps, it will be seen, to vindicate his character for five or six years subsequent to the date of the defamation, for which he now seeks compensation or damages to the amount of 10,00,000 rupees. It was incumbent on the defendant to weigh well the circumstances under which he took upon himself to charge an innocent party with so heinous an offence; and he is not justified in having done so, supposing the *dacoitee* to have occurred, without reasonable grounds for his belief of the plaintiff's participation in the crime.

After due consideration, the Court award 500 rupees damages with costs proportionably against the respondent, Mudden Mohun Adhikaree. Plaintiff's suit against Ahsan Allah is dismissed, and his costs are payable by plaintiff.

RAM CHURN DAS, PAUPER, (PLAINTIFF,) APPELLANT,

versus

CHUTTUR BHOJE AND RAM UNOOJE DAS,

(DEFENDANTS,) RESPONDENTS.

Regular Appeal from a decision of the Principal Sudder Ameen of Cuttack.

1845.

May 13.

In a claim to the office of presiding *mohunt* of a *muth* at Juggernath, misappropriation of its property and funds by the plaintiff, although not disqualifying him according to the *shastres*, was held, under Regulation XIX. 1810, to bar his title

Mr. DICK:

THE appellant instituted this case, asserting his right to the *guddee* of the *muth* Dukin Paris, dependent on Balshahee, laying his suit at Rs. 5,71,573-6-9, of which he had been deprived by the proceedings of the local agents, acting under Regulation XIX. of 1810. The foundation of his claim rested on the succession to the superintendency of the *muth* being hereditary, and therefore, he being *chela* or pupil of the last *mohunt*, and the person selected only a *gooroobhaee*, or spiritual brother, he should have been preferred, and appointed *mohunt*. The respondent contended that he himself had been properly elected, that the appellant had been excluded from the selection on account of misappropriation of the property of the temple, and that the succession was not hereditary but elective.

Ram Churn Das *v.* Chuttur Bhoje.

The principal sudder ameen, deeming the election and appointment of respondent to the superintendency, proper and correct, rejected the claim of appellant and dismissed his suit.

In the record of this case, the Court found nothing which could shew whether the *muth* in question was hereditary, or elective. They therefore sent for the record in the case of Mohunt Rama Nooj Das, decided on the 17th June 1839, and reported in Volume VI. page 262, Sudder Dewanny Reports. On perusal of the depositions therein taken by order of this Court, of the *mohunts* of the *muths* in Cuttack around Juggurnath, on this very point, it appears that the *muth* or temple in question in this case is hereditary, and that, in *muths* of this class, a successor is usually nominated by the *mohunt* during his life-time; if not, after his death, the disciples, or *chelas*, and *gooroobhaees*, or spiritual brethren, assemble, and select the eldest *chela*, or disciple, if properly qualified; otherwise some other of the *chelas*, *gooroobhaees*, or even *chelas*, &c. of another *muth*. If they cannot agree in their choice, the ruling power is applied to, who commands an assembly of *mohunts* to select a proper person, whom he confirms in the *guddee* or superintendency.

In this case, the former mohunt appointed no successor, and in consequence of several claimants starting up, complaints were preferred to the register, the head civil authority in the district; and he, after a reference to the brethren of the *muth*, about the appellant's qualification for the *guddee*, appointed him. The commissioner of the province, who was vested with the full powers of the Sudder Adawlut, cancelled the whole of the register's proceedings, as illegal, and referred the case to the local agents under Regulation XIX. 1810. The local agents, after excluding the appellant on account of his having misappropriated by alienation property of the temple, during the time he held the superintendency under the sanction of the register, directed another assembly for selection of a proper successor to the late *mohunt*. The assembly elected the respondent, and gave in detail their reasons for the same. The respondent was therefore appointed to the *guddee* by the local agents, and the appointment confirmed by the commissioner. Thus then all was done according to established usage, and the only point for consideration is, whether the appellant was justly and legally excluded from the selection by the local agents.

It is true, as has been urged by the appellant's pleaders, and apparent in the *bywastha* given in the case of Rama Nooj Das above cited, that misappropriation is not specified as a disqualification in the *shastres;* but the Regulation XIX. 1810, was enacted, and the local agents appointed, expressly for the purpose of preventing misappropriation of the funds and property of temples, &c. and therefore the local agents were bound to consider it a disqualification. Their decision on that point was not appealed from to the commissioner by the appellant; and indeed its truth has been virtually admitted by his attempt to justify it by similar conduct of other

mohunts, and even of the respondent himself. Their guilt, however, cannot prove his innocence. The Court therefore confirm the decision of the principal sudder ameen, and dismiss the appeal with costs.

Ram Churn Das *v.* Chuttur Bhoje.

NADIR OON NISSA CHOWDRAIN, WIDOW OF MOONSHEE HEMAYETOOLAH, (DEFENDANT,) APPELLANT,

versus

PRAN KOONWUR BIRMUNNEE, WIDOW OF DHUN PUT BABOO, AND MOTHER OF RAM SOONDER BABOO, AND NEELMADUB RAE AND OTHER HEIRS OF GOOROOPERSHAD RAE, (PLAINTIFFS,) RESPONDENTS.

Regular Appeal from a decision of Mr. J. Grant, Judge of Dinagepore, dated 29th May 1840.

1845.

May 16.

Property having been decreed, may become the subject of a fresh suit between members of the successful party, for the adjustment of their respective shares in it.

Mr. TUCKER:

THIS suit was instituted on the 18th September 1839; and the plaint sets forth, that Dhun Put Baboo, Gooroopershad Rae, and Hemayet-oolah, were joint proprietors of Bhamun Koonda, &c. fifteen *pergunnahs*, purchased by them in the Bengal year 1208, at a public sale held for the recovery of arrears of Government revenue.

That in the Bengal year 1210, the said three persons made a division amongst themselves of the property into three equal parts; that

Thoke Khetnal fell to the lot of Dhun Put Baboo,

Thoke Khass talooks to the lot of Gooroopershad Rae, and

Thoke Bhamun Koonda to that of Hemayet-oollah;

and that the said *thokes* or divisions have been held in distinct and separate possession by each respectively ever since.

That at the time of the division it was mutually agreed between the parties that, in the event of any of the three being dispossessed of any portion of the lands appertaining to their respective divisions, the whole three should sue jointly for the recovery of the same, and each bear an equal share of expenses; but, in the event of obtaining a decree, the lands recovered, with the mesne profits due thereon, should belong exclusively to the party dispossessed.

That in the year 1225, one Rae Danish Mund dispossessed them of seventeen villages. That a suit for the recovery of the same was instituted in the joint names of the parties, and the expenses defrayed by each, share and share alike.

That a decree was obtained for only eleven villages. These eleven villages appertained to the three thokes, thus:

Thoke Khetnal—mouzahs Nodah—Preeagpoor Gowarah—Bishennathpoor, and ⅓d of mouzah Attaparah, 4-⅓

Thoke Khass talooks—mouzahs Burrul—Badehburrul Jhael—Tippoorah, and ⅓d of mouzah Attaparah, .. 4-⅓

Thoke Bhamun Koonda—mouzahs Hurreenathpoor—Dosadpoorah, and ⅓d of mouzah Attaparah, . 2-⅓

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That the mesne profits on these eleven villages paid into court, after deducting the *ameen's* expenses, amounted to Sicca rupees 7,381-14-2.

That from the *ameen's* accounts the said sum would be distributable, under the agreement above noticed, as follows:

Thoke Khetnal, ...	Sicca rupees	2938	5	6	2
Thoke Khass talooks, ...		3589	1	13	2
Thoke Bhamun Koondah, ...		853	13	19	3

That this sum was paid by the court to the parties, share and share alike, because the plaint was a joint one, and the decree makes no mention of a division of interests amongst the parties in the *mofussil*. That by this distribution, the proprietors of Thoke Bhamun Koonda have received Sicca rupees 1,606-3 more than their due, of which Sicca rupees 477-11-6-2, appertains to the proprietors of Thoke Khetnal, and Sicca rupees 1,128-7-13-2 to the proprietors of Thoke Khass talooks.

The present suit was therefore instituted by the proprietors of Thokes Khetnal and Khass talooks against those of Thoke Bhamun Koondah, to recover the said amount, with interest thereon from 29th Maugh 1240 B. S. (the day on which the *wasilat* was paid to the parties by the court) to the date of institution of suit, being Sicca rupees 1,071-8-13, or together Sicca rupees 2,680-11-13, equivalent to Company's rupees 2,859-7.

The case was not defended in the zillah court, and the judge, finding the plaint to be supported in all points, decreed in full for the plaintiffs on 29th May 1840.

An appeal having been preferred to the Court of Sudder Dewanny Adawlut, the case came first before Mr. Edward Lee Warner, who recorded his opinion on the 13th December 1841. Mr. Lee Warner proposed to reverse the decision of the lower court, on the grounds that the original suit made no mention of any distinction of rights and interests among the parties, and that the decree awarded the eleven villages, and the mesne profits due thereon, to the parties jointly, and further that the objection made at the time by the plaintiffs to the distribution of the mesne profits in equal shares having been overruled by the court, the matter could not now be the subject of a fresh suit.

The case was next heard by Mr. J. F. M. Reid, who recorded his opinion on the 2d March 1843. Mr. Reid differed from Mr. Lee Warner, and was for affirming the decree of the lower court. He observed that an order passed in execution of a decree, affecting the *chose* to be taken from one party and given to the other party, would clearly bar either of the parties bringing an action to contest that point; but not so when, as in the present instance, the dispute arose amongst the successful party as to the amount of their respective shares of that *chose*; that the rights of the parties relatively was not the point at issue in the former suit—consequently, he was of opinion the present action would lie; and as the appellant's vakeel, on being questioned, had nothing to urge against the correctness of the statement made by the plain-

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tiffs, Mr. Reid affirmed the decree of the lower court, with costs chargeable to the appellant, and directed the proceedings to be laid before a third judge.

The case came on before me, this day; and, observing that the defendants had not appeared in the lower court, I should have dismissed the appeal under the Circular Order of the 12th March 1841, had not the two judges above-mentioned omitted to notice the point, and had I not fully concurred with Mr. Reid on the merits of the case. Had the court, when paying away the mesne profits, entertained the objections of the plaintiffs and overruled them after investigation, then, it is my opinion, with reference to Construction No. 1129, dated 9th February 1838, this action could not have been maintained; but the court refused to enter on the question of the relative rights of the parties, observing that the decree made no distinction, and therefore the amount of mesne profits, must be paid to the parties jointly. The present action was based on a private agreement between the parties, which bound them to sue jointly, should one or more be disturbed in possession, so that the original suit was in strict conformity with this agreement, and if binding in one point, it should be so in all. The appellants do not impugn the correctness of the account given by the respondents; but rest on the plea that the action is not maintainable, the point having been raised in the execution of the original decree, and then overruled.

I therefore, concurring in opinion with Mr. Reid, make absolute the order, affirming the decision of the lower court, with costs chargeable to the appellants.

MOOSUMAT SHAMA SOONDERY, WIFE OF RADHACHURN SEIN, DECEASED, AND BIRJ KISHWUR SEIN, (PLAINTIFFS,) APPELLANTS,

MIRZA AHMUD JAN AND OTHERS, (DEFENDANTS,) RESPONDENTS.

Special Appeal from a decision of Mr. R. Loughnan, Judge of Backergunge.

1845

July 23.

Messrs. REID, DICK, and GORDON:

THE appellants state, that their ancestor obtained, from the *zemeendars* of *pergunnah* Dukun Shabazpoor, three *talookdaree pottahs*, one in the year 1156, and two in the year 1165, of *talookeh mouzah* Manikpoor and *mouzahs* Neamutpoor and others. That in 1171, a regular settlement agreement was entered into

The law of limitation does not apply to a claim to a reduction of rent on account of diluvion, preferred during the course of diluvion; but if delayed beyond 12 years after its cessation, the claim would be barred.

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between the *zemeendars* and the *talookdar* for the above lands,—one condition of the settlement being, that the *talookdar* should receive an abatement of rent for land carried away by the river. That diluvion had taken place, to a great extent, from the year 1230. That the appellants had applied, without success, for a suitable reduction of rent. That from the year 1233, land belonging to *mouzah* Manikpoor, had been appropriated by the Government, for the manufacture of salt,—the *zemeendars* receiving a remission of revenue on account of the same, but the *talookdars* none from the *zemeendars*. They accordingly brought the present suit, on the 16th April 1839, to obtain a reduction of annual rent to the extent of Company's rupees 3,698-2-5 gundas, that being the amount to which they were entitled, according to measurement.

The respondents answered, that two separate causes of action had been illegally included in the same suit; that no such settlement agreement as that on which the appellants founded their claim, had been entered into; and that as more than 16 years had elapsed from the date when diluvion is alleged to have commenced, up to the date of action, the suit was barred by the rule of limitation.

On the 18th July 1840, the principal sudder ameen, Chunder Seekur Rai Chowdry, decided that, with respect to the claim for remission on account of land appropriated for the manufacture of salt, the plaintiffs might sue separately. He dismissed the claim for reduction of rent on account of diluvion, because he doubted the genuineness of the settlement founded on by the plaintiffs; because he considered that at the decennial settlement the *talookdars* had entered into a settlement with the *zemeendars*, for their lands, at an invariable rent; and because the suit was barred by the rule of limitation, more than 12 years having elapsed from the date when diluvion commenced.

On the 17th November 1843, the judge confirmed the above decree, confining his confirmation, in the claim for reduction on account of diluvion, to the ground, that the claim was barred by the rule of limitation.

A special appeal was admitted in this case by Mr. J. F. M. Reid, on the 6th July 1844, to try the point, whether the rule of limitation applied.

We are of opinion, that the rule of limitation has not been properly applied in this case. Assuming, that an under tenant has, by the terms of his settlement, a claim to a reduction of rent, on account of diluvion, we think it would be a forced and unjust construction of the law of limitation, to require the under tenant to bring his suit within 12 years from the date when diluvion commenced. The operation of diluvion is very uncertain. Sometimes it is very slow and gradual; at other times it is equally rapid. Sometimes, slow at first, it is rapid afterwards. It is absolutely necessary, therefore, to allow some latitude to a tenant whose lands have suffered from the action of the river, in fixing the time

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when he may think it proper, from the amount of loss sustained, to bring an action against his *zemeendar*. If after diluvion had entirely ceased, no claim for compensation were made for 12 years, that would be a case, we conceive, in which the rule of limitation would apply. Over-ruling, then, the above ground for dismissing the suit, and observing that the judge did not investigate the other points, we return the case, that the judge may re-admit it on his file, and after making the necessary inquiries, pass a suitable decree. The judge will be careful in sifting the principal sudder ameen's reasons for rejecting the alleged terms of settlement between the *zemeendars* and the *talookdar* in 1171,—those reasons appearing to us any thing but satisfactory. The price of the stampt paper on which the appeal was written will be returned to the appellant.

REMARKS.

This judgment, it will be observed, only rules that a claim although delayed beyond twelve years, diluvion the while proceeding, would not be barred. The question remains whether the abatement, if claimed for more than twelve years, would be allowed. It has already been decided that in an action for arrears of rent for twenty years, the plaintiff was entitled on proof to a decree for such period as was not barred by the law of limitations. See the case of Radamohun Ghose Choudree *versus* Ram Chand Mustofee and others, 26th September 1814, reported at page 182 of this volume.

SUMESHUR PANDEE, KUTWAROO PANDEE, SOBNATH CHOBEE, SUKRAJ CHOBEE, AND HUNS CHOBEE, (DEFENDANTS,) APPELLANTS,

versus

RAJAH GOPAL SURN SING, ON HIS DEMISE, RAJAH OODIT PURKAS SING, HIS SON, (PLAINTIFF,) RESPONDENT.

Special Appeal from a decision passed by the Judge of Shahabad, Mr. W. S. Alexander, May 20th 1842, affirming a decree of the Principal Sudder Ameen, Munowur Ali, passed November 16th 1840.

1845.

September 24.

To establish a claim under Regulation I. 1795, it is incumbent on the claimant to prove his title as village zemindar of the lands forming the ground of action.

Messrs. RATTRAY, TUCKER, and BARLOW:

THIS suit was instituted by plaintiff, on the 28th April 1835, to recover from defendants possession of *mouzah* Gheoreea, in *pergunnah* Chounsah; the farmer of the *mouzah* (Sheoumber) being dead, and he (plaintiff) having a right to what he claims as general proprietor of the *pergunnah*.

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The statement of plaintiff was, to the effect, that his ancestors had been the original proprietors of the whole *pergunnah* (of Chounsah) from which they were driven by rajah Bulwunt Sing; that in 1189 Fuslee (1782,) they were restored by a *sunnud* from Mr. Hastings, in favor of his progenitor Bhuggut Sing; that up to the present hour they receive *malikanah* from the Government; that the village in question was let in farm, to Sheoumber, in 1197 Fuslee; that on his death in 1237 F., he (plaintiff) presented a petition to the collector, to have the settlement made with him, under the provisions of Clause 5, Section 3, Regulation I. 1795; that Sukraj Chobee and others also applied, and the collector, without enquiring into his (plaintiff's) rights, made the settlement with them, on the ground of their names being recorded in the *pareena duftur;* that defendants had no documents, but that the collector had pleaded for them that documents could not have been preserved by them through such a length of time; but they assert possession in 1196 Fuslee, and had they ever possessed any title-deeds, they would have been forthcoming; that the collector states, on the authority of the *pareena* records, that defendants were in possession as *zemindars* from 1182 to 1196 Fuslee; but these records bear no official signature, and are full of erasures and alterations; that the time stated, too, is that of the forcible occupancy of the rajah of Benares, whose grants, if made, are invalid; that the name of Mya Chobee, defendant's ancestor, appears both before and after 1194, in the *pareena* papers, without the addition of "*zemindar;*" that in 1806, (1213 Fuslee,) claims urged by Purkasht Pandee and Mohun Chobee were rejected, because they had nothing to produce in proof of a *zemindaree* right, and no appeal having been preferred, that rejection was final; that Section 1, Regulation I. 1795, does not apply to defendant's case, as the collector has applied it, and further, has reference to *zemindars* dispossessed previously to 1st July 1775, (17th Assar 1182 Fuslee); that the collector admitted that his (plaintiff's) ancestors held the pergunnah of Chounsah, "*zemindaree* and *rajgee*,"—why then does he refuse the settlement? that the collector states the *zemindaree sunnud* of the 11th October 1781, to have been granted solely on the *urzee* of Bhuggut Singh, who styled himself "the old *zemindar* of *pergunnah* Chounsah," but that was the custom of the period, and he possessed papers of an earlier date, granted by competent persons, to prove his right; that the collector states, that had he possessed *zemindary* rights in virtue of those documents, the settlement would have been made with him from the first,—but this is refuted by Section 12, Regulation II. 1795; that the collector urges, that numerous villages have been settled permanently and temporarily, and sales public and private made with others, and that decrees have been passed in the courts in favor of many, without any objection being urged by plaintiff's family,—but it is clear that the settlement of 1197 Fuslee, did

not affect proprietory rights, as may be seen by Section 26, Regulation II. 1795, and his (plaintiff's) family were then deprived of their rightful settlement only because the *rajah* of Benares did not choose to admit them: this was afterwards revoked however; and he now claims to succeed, on the death of the farmer, under Clause 5, Section 3, Regulation I. 1795.

Defendants, in answer to the above, observed, that the plaintiff's claim to a general right to the whole *pergunnah*, furnished no competency to him to institute a suit for possession of a specific portion of it; that neither he nor his ancestors ever had any such right; if they had, why had they so long abstained from asserting it? many estates in the *pergunnah* had been permanently settled with others, as proprietors, and are daily being so settled, without any claim being opposed by plaintiff. Under the law of limitation too, his claim is barred. His *sunnud* does not confer any proprietory right. What he states to have been granted as *malikana*, was not so. Bhuggut Singh and Juggut Singh were in attendance on Mr. Hastings, and the grant was for pay, as a *jaygheer*, as may be shewn by the *sunnuds* of 11th October 1781 and 16th September 1785, and by various papers filed by plaintiff himself. The *pareena dufter* was formed from accounts furnished by the *canoongoes*, under orders from the Board of Commissioners; and if not attested, its documents are still held in great repute, and are constantly referred to in the courts, collectorates, &c. Originally there were no erasures or alterations: those which now appear, may be ascribed to plaintiff, who falsified the column containing the names of the *zemindars*, so that defendants were made to appear as *gomashtehs* of plaintiff, or as farmers, *ryuts*, &c. Their names not appearing in the accounts of every year, is of no consequence; it is essential only in the year of settlement. The decrees of the Mirzapoor court filed by plaintiff, are of no service to his cause: they were struck off the file in default on their (defendants') part, which default arose from their subsequent knowledge, that the claim they had made was not tenable during the lifetime of the farmer. Regulations I. and II. of 1795, were more in their favor, as village-zemindars, than plaintiff's, as shewn by a decree of the Sudder Court which was filed. When the settlements of 1202 Fuslee, were made by the resident, the village-zemindars were acknowledged in numerous instances; while, if plaintiff's claim were good, he should have had the settlement of every estate in the *pergunnah*. The accounts referred to by plaintiff, of 1091 and 1112 Fuslee, are altogether unworthy of credit, and there is no saying whence they come. The plaintiff states, that the *rajah* of Benares (Muheeput Singh) prevented the settlement with him in 1197 and 1202: this is not credible: other *pergunnahs* were settled for with plaintiff's uncle, because he had purchased them; and hence it appears, that, where there were village-zemindars, their claim to a settlement was paramount.

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Plaintiff added, in reply, that the question to be determined, was, which of the two, defendants or himself, had the proprietory right in this particular village: he claimed nothing further. The rest was explanatory of documents before noted, or of facts and circumstances which will be found adverted to in the appeal proceedings of the Sudder Court.

The principal sudder ameen was of opinion, that no proprietory right had been established by defendants; inasmuch as no dependance could be placed on the documents which they had produced or referred to, in proof of such right. On the other hand, he deemed the evidence adduced by plaintiff to be conclusive in favor of his claim. As furnishing proof of plaintiff's right, he adverted to a former decree, passed in his own court on the 26th February 1838, disposing of the very question before him, when no such pretensions as those now urged, were advanced by defendants; and cited the following documents as additional ground for the judgment which he considered the case to call for, viz.

A *purwannah* of Mr. Hastings, dated 11th October 1781;

A proceeding of the Council, dated 11th April 1788;

A proceeding of the resident of Benares, dated 27th July 1791; and

A letter of Mr. Jonathan Duncan (the resident) dated 16th February 1788.

These were deemed to shew, that plaintiff's family had originally a proprietory right to the entire *pergunnah* of Chounsah; that such right was acknowledged, and possession held under it, till rajah Bulwunt Singh expelled them; that possession was restored to them in the person of Bhuggut Singh, plaintiff's paternal ancestor; and that as his descendant, and heir to the property enjoyed by him, plaintiff's title is clear, and must be upheld under Clauses 5 and 6, Section 3, Regulation I. of 1795.

A decree was passed in favor of plaintiff accordingly: and, in appeal to the judge, the same was affirmed, upon the same evidence as had induced the first decision.

A special appeal was then applied for; and admitted by the Sudder Court with reference to a judgment passed in 1803, in the case of rajah Pirtee Put, appellant, *versus* Sheonath and others, respondents; in which on the 19th October, that year, it was determined that, in claims of this nature, the particular local proprietory right must be established,—the *raj* right, or that of lord paramount of the *pergunnah*, being insufficient to uphold a claim to actual possession of the soil.

The Court observe, that plaintiff claims the estate of Gheereeah, principally with reference to a *perwaneh* granted by Mr. Hastings to his (plaintiff's) ancestor, Bhuggut Singh, in the year 1781, and to certain proceedings of the then Government, which, as he asserts, recognised his claim by awarding to him '*malikana*,' which he still receives. He files a decision of the Sudder De-

wanny Adawlut of the 6th January 1829, by which the plaintiff in the suit was declared to have the right of settlement in a village in *pergunnah* Kuntit, under circumstances similar to those of the present case; and another decision of the lower courts, affirmed in the Sudder Court, December 26th 1836, in which the plaintiff obtained a settlement of a village in *pergunnah* Chounsah, under a deed of gift from rajah Bhuggut Singh, from which he would infer the latter, his ancestor, to have possessed a proprietory right to the whole *pergunnah*. On examination of this deed, the Court find, that the *rajah*, styling himself *malik* of *pergunnah* Chounsah, acknowledges the existence of other village-zemindars in the said *pergunnah*, to one of whom he makes a grant of a village which had always been in his (the *rajah's*) possession as a village-zemindar; thereby clearly drawing a distinction between his rights as *malik* of *pergunnah* Chounsah, and his rights as village-zemindar of the *pergunnah*. The *purwaneh* granted to Bhuggut Singh is evidently founded on a representation from Bhuggut Singh, himself, to Mr. Hastings, in which he asserts that *pergunnah* Chounsah is his hereditary *zemindary*, from which he has been ousted by rajah Bulwunt Singh. Upon this, Mr. Hastings directs that he be reinstated in the *pergunnah*. On reference to the proceedings of the Government alluded to by plaintiff, which have been furnished through the Secretary's office at the request of the Court, the Court find that Bhuggut Singh did not retain his possession beyond a few weeks; the *rajah* of Benares refusing to recognise him. Mr. Hastings then ordered that a pecuniary compensation should be allowed to him, to the extent of 11,000 rupees per annum; which was duly paid for a certain period. These proceedings subsequently came under the revision of the Government, by whom they were referred to the Home Authorities, as infringing on the rights of the *rajah* of Benares: a recommendation accompanied the reference, that, adverting to the services of Bhuggut Singh, and in deference to Mr. Hastings, an allowance of 500 rupees per mensem should be paid to the former by Government in lieu of that which, in point of fact, was paid by the *rajah*; the amount having been debited to him by the resident, with whom rested the control of his affairs.

It has already been ruled by the Court, in a case decided by Messrs. Harington and Colebrooke in 1803, (the case with reference to which this appeal was admitted,) that to establish a claim under the law (Regulation I. 1795,) it was incumbent on the claimant to prove his title as village-zemindar of the lands forming the ground of action; all pretensions based merely on the possession of the dignity of lord paramount of the *pergunnah*, being inadmissible. Another decision however, passed by Messrs. Sealy and Turnbull in 1829, is opposed to the principle laid down in the former. In the present instance, the Court follow the original precedent; deeming it (with reference to Section 12, Regulation II. 1795,) more in conformity with the law, and deci-

Sumeshur Pandee *v.* Rajah Gopal Sura Singh.

dedly more equitable towards those whose rights and interests are dependent on their construction of it.

In the case before them, the respondent (plaintiff) has nothing to adduce beyond his pretensions as lord paramount of the *pergunnah* of Chounsah: the Court therefore reject his claim, founded on such pretensions, to the village of Gheoreeah, with costs payable by him in the three courts.

HENRY CHRISTIAN, (DEFENDANT,) APPELLANT,

versus

JAMES PARKER, (PLAINTIFF,) RESPONDENT.

Special Appeal from a decision of the Principal Sudder Ameen of Tirhoot, Niamut Ali Khan, passed February 23d, 1844, *affirming a decree passed by the Sudder Ameen, Sulamut Ali Khan, May 12th*, 1843.

1845.

November 19

An act proved in a criminal court being made the ground of a civil action, evidence offered in its disproof cannot be refused by the civil court.

Mr. RATTRAY:

THIS suit was instituted by respondent, on the 6th May 1842, to recover from appellant the sum of Company's rupees 570-11, the value of certain hides and horns, with reference to the following facts and circumstances.

Respondent's servants had charged appellant and his servants, before the magistrate, with having carried away from their master's factory, by force, 200 hides, 150 horns, 25 maunds of *kharee nimuk*, (sulphate of soda,) 10 buffaloes, and 50 rupees. The accused denied the charge; but the magistrate, deeming the violence to be proved, punished them, without any recorded reference to the amount of property taken. At the conclusion of his final order disposing of the case, he says, 'let the hides under charge of the court be given to the prosecutor (respondent) on his receipt, and let him be informed that, if he has any claim for the remaining hides and horns, he may sue for them in the civil court.' Upon this, the present suit was instituted for the whole of the items above enumerated. Appellant opposed the claim, praying to be permitted to call witnesses in disproof of it; pleading, at the same time, that respondent had evidently received back some of the hides from the criminal court, but had nevertheless sued for the entire number (200) originally stated to have been taken from him.

The sudder ameen would not allow appellant's witnesses to be summoned, on the ground that a negative could not thus be established; and, adjudging to respondent the value of the 200 hides, reserved to appellant the right to sue, should he see fit, for the refund of the amount of as many as should be then proved to have been restored by the magistrate.

Henry Christian *v.* James Parker.

The sudder ameen's decree was affirmed, in appeal, by the principal sudder ameen; the latter observing, that, the aggression having been proved in the criminal court, appellant could not legally claim a right to have his witnesses called and examined in the civil court.

The above decision appearing to the Court to be both unjust and illegal, the special appeal preferred against it was admitted, and the case has now come regularly on for revisal. With reference to those points in the proceedings which the Court deem objectionable, viz. the refusal to summon appellant's witnesses; the award of the value of the entire number of hides in the face of a judicial record of a portion having been restored; and the order compelling appellant to bring a fresh action to recover the value of those so restored; the Court hereby direct, that the decision passed and now appealed from, be annulled and of no effect; and that the case be returned, to be retried upon its merits, with a due observance, in the new trial, of the law and practice of the courts.

MEERTINJAY SHAH AND OTHERS, (DEFENDANTS,) APPELLANTS,

versus

BABOO GOPAL LAL THAKOOR, (PLAINTIFF,) RESPONDENT.

Regular Appeal from a decision of the Principal Sudder Ameen of Zillah Backergunge, Rae Chunder Seekur Chowdhree.

1845.

December 3.

The rule of limitation does not apply to a suit for an adjustment of rents.

Messrs. REID, DICK, and JACKSON:

THE plaintiff, respondent, in virtue of being the *zumeendar*, by purchase at auction sale for arrears of revenue, of 14 annas of the *zumeendaree* in which the *talook* in question is situated, sued to have it declared invalid, and his right admitted to re-let the lands anew. The defendants, appellants, pleaded the right of *istemrardars*, or *talookdars* dependant, not liable to enhancement of rent, and also pleaded lapse of time as a bar to the suit.

Several under tenants of the *talookdars*, on alleged permanent tenures, denominated *howaladars*, likewise appeared, and opposed their respective claims to immunity.

The principal sudder ameen, deeming the defence set up untenable, decreed the *talook* invalid, and the right of plaintiff to make a new settlement, and he declared the right of Chundee Pershad Chukurbuttee, who had purchased his *howalas*, or permanent tenures, from the defendants, some months after this suit had been instituted, invalid, and liable to assessment anew.

The defendants appealed to this Court, as did Chundee Purshad, in a special case.

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Messrs. Reid and Jackson:

The decision of this case was postponed by Messrs. Reid, Dick, and Gordon, at a previous sitting, to consider the question whether the claim of the *zumeendar* to assess the tenure of the defendants was barred by the fact of his not having brought his action within 12 years; and the case was brought on again this day.

After mature deliberation, we are of opinion that the claim to assess, being a perpetually recurring cause of action, cannot be barred by the lapse of time, and that therefore the plaintiff was justified in bringing this action.

In regard to the claim of the defendants to hold their tenure as a *talook* on a fixed rent, we concur with the principal sudder ameen in thinking that the evidence adduced by them is insufficient to bear out their assertion that any such grant had ever been made to them.

We see no reason to interfere with the settlement made, and consequently dismiss the appeal, and confirm the decision of the principal sudder ameen. The costs on the appeal are charged to the appellants.

Mr. Dick:

I hold that the law of limitation does apply, as a bar to this suit, which is a claim not merely to assess land liable to variable rent, but to cancel a fixed rent tenure, a dependant *talook*. Under Section 49, Regulation VIII. 1793, *istemrardars (mookurrureedars)* described in Section 19, who have held their lands for more than 12 years at a fixed rent, are not liable to be assessed with any increase. The principle of the law of limitation and of prescription is, fundamentally, that if a right be not preferred within a certain period, it has been alienated, and foregone. If then the *zumeendar* did not, within 12 years from the time of the decennial settlement, avail himself of his right to challenge the title of the *istemrardar*, it was foregone and lost. *A fortiori*, the successor of that *zumeendar*, who stands exactly in the place he stood in at the decennial settlement, has foregone his right, if he permit 12 years to elapse without preferring it. In the present case 25 years elapsed. Under Clause 2, Section 2, Regulation XIX. 1793, no claim to hold land exempt from the payment of revenue, which has been subjected to payment within 12 years from the date the claim is preferred, can be heard; and in justice, the converse of the proposition must hold good. Under Clause 4, Section 3, Regulation II. 1805, the legislature has enacted only two exceptions to the law of limitation, and this is not one. In this country, the elements of destruction of documentary proof are constant and numerous, and therefore the law of limitation should be strictly enforced here, if any where. The proof of having possessed the tenure at a fixed *jumma* 12 years previous to the decennial settlement, would have been easy, and

equitably required, had the claim to annul it been preferred when the law was enacted, and as the legislature doubtless contemplated. The *pottah* and receipts of rent paid during the previous 12 years would naturally have been at hand, and would at once have established the validity or otherwise of the tenure. Now, it would be next to a miracle to have them to produce, after a lapse of nearly 50 years, and most unjust to expect it. I may further add, in equity, that if the law be not applied to such claim, a *zumeendar* has every inducement to hold back, until the land is brought into the highest state of cultivation, and then to pounce upon it, when the holder of the tenure is least able to oppose his claim; and thus be deprived of the labor and expenditure of generations! In like manner, an auction purchaser of a *zumeendaree* sold for arrears of revenue, cannot enhance the rent of tenures which have not been, and may not be proved liable to increase of assessment. Under Section 51, Regulation VIII. 1793, he has the right to increase the rent of the tenure "on proving that he is entitled to enhance by a special custom, or by the conditions of the tenure, or by the holder having received abatements of the *jumma*." The *onus probandi*, therefore, clearly rests on him. Again, the right of the original proprietor is preserved to him by Regulation XI. 1822. The original proprietor had this right. If the original proprietor neglected to enforce his right within the period allowed by law, he lost it; so the auction purchaser, his *locum tenens*, with much greater justice, inasmuch as every succeeding period creates a stronger presumption in favor of the *talookdar*, or under tenant, from his right not having been questioned during so long a period, and in equity from his means of defending his right becoming daily more and more diminished. A correct decision in this case is of the utmost importance. If the law of limitation of 12 years does not apply to claims of *zumeendars* to resume or enhance, so neither can the limitation of 60 years apply to Government claims to resume. But by Clause 2, Section 2, Regulation II. 1805, no claim of Government, whether for the assessment of land held exempt from the public revenue, i. e. to resume land not paying revenue, or for the recovery of arrears, or for any public right whatever can be heard, beyond the period of 60 years from and after the cause of action—consequently such a construction of the law, being a palpable contradiction, must be erroneous.

With respect to the validity of the tenure, I think excellent and sufficient proof to substantiate it has been produced. There are deeds of sale and purchase of a portion of the tenure bearing date 1222 B. Æ. or 1815 A. D. These incontestably prove the existence of the tenure at and before that time, 30 years ago! There is not a tittle of evidence, nay, not even a surmise, that the tenure was created between that time and the decennial settlement. But there are deeds, a marriage settlement, and one of allotment of property, in which the tenure is evidently mentioned,

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and which prove its existence in 1178, B. Æ. The marriage settlement is open to no suspicion, having been filed in a court of law for another purpose, so far back as 1812, A. D. Thus, I conceive, the appellants have proved the existence of their tenure upwards of 70 years ago, in a manner few can ever hope to do, by a purely fortuitous, though most unexceptionable piece of evidence. I would therefore decree the appeal and reverse the decision of the lower court.

REMARKS.

The main question at issue in the above case having been referred for the consideration of the Court at large, the following are the opinions which were recorded on it by Messrs. Gordon, Tucker, and Rattray.

Mr. Gordon.—"The question for consideration, is, whether a suit brought by the purchaser of an estate, at a sale for arrears of revenue, and after the expiration of 12 years from the date of his purchase, to assess the lands of an under-tenant, at full rates, is barred by the rule of limitation alone, without reference to any proof of right which the under-tenant may set forth, to hold the lands at a fixed rent? By Section 29 of Regulation XI. of 1822, an auction purchaser acquires all the rights which were possessed by the person, with whom the original settlement was included. If then, we would know, what, in the case supposed, the former can do, we must ascertain, what were the powers of the latter. The provisions of the law, which relate to the rents of under-tenures, are contained in Sections 48, 49 and 51 of Regulation VIII. of 1793. The first of these sections enjoins the *zemindar* to enter into a settlement with his under-tenants, or *talookdars* as they are called, at full, or progressive rents. Section 49 lays down the conditions upon which the *talookdar* is entitled to hold the lands at a fixed rent. Those conditions are two. An increase of rent cannot be imposed, if the *talookdar* shall have held the lands at a fixed rent for 12 years, or for a shorter period than 12 years, if the *zumeendar* shall have entered into a contract not to increase the rent. Section 51 refers to a class of tenures, the rent of which cannot be increased, except under particular circumstances, which are enumerated. A good deal of discussion has arisen concerning the nature of the tenure that is mentioned in this section. It cannot, in my opinion, refer to a tenure, only part of the lands of which has been brought into cultivation; nor can it mean a tenure in full cultivation, but one the lands of which are assessed at a rate of rent greatly below that prevailing then in the *pergunnah*. Under either of these meanings, Sections 48 and 49 would be absolutely useless. The true construction, as it seems to me, of this Section, is, that the rent of a tenure in full cultivation, and assessed at the ordinary rate of rent then prevailing in the neighbourhood, cannot be increased, except under the circumstances enumerated in the sec-

tion. This being the state of the law, with respect to under-tenures, at the time of the decennial settlement, let us suppose A, a *zumeendar*, brings a suit against B, a *talookdar*, to increase his rent, though more than 12 years had elapsed from the date of the decennial settlement. In such a case, what would it be necessary for B to prove to be exempted from an enhancement of rent? If he could prove that his tenure was of the kind described under Section 49 as above noticed, A's suit would be properly dismissed. But if B could not prove that his tenure was of that kind, it would be incumbent on him, I conceive, to show, that the tenure existed at the date of the decennial settlement, and that it was of the nature of those described in Section 51, as explained by me. It would not be enough that he should prove, that for 12 years he had not paid more than a certain rent; for the forbearance of the *zumeendar*, for the past, to assess newly cultivated land, or his assessment of cultivated land at an inadequate rent could not be a bar to his claim to assess at full rates for the future, unless he had come under a contract *not* to assess at full rates. This view is supported by the precedent of Khaja Neekoos Marcar *versus* Ram Lochun Ghose in volume III. of the printed Reports, page 221. It follows, that the suit alluded to at the commencement of these remarks cannot be dismissed, solely on the ground of the auction purchaser having delayed for more than 12 years to institute the suit."

Mr. Tucker.—"I concur with Mr. Gordon that a suit of this nature cannot be dismissed on the law of limitations alone. If so, Section 29, Regulation XI. 1822, would be a mere deception to enhance the value of landed property. If the tenure be not protected by the law of 1793, that is, if it were not held at a fixed rent for more than 12 years previous to the permanent settlement under Section 49, Regulation VIII., or, if it be not protected by Clause 1 of Section 51, it is subject, at any time the *zumeendar* please to make the demand, to assessment at the *pergunnah* rates. This is clearly laid down in Section 5, Regulation XLIV. 1793, in regard to purchasers at public sale. Mr. Dick seems to lay stress on the plaintiff, a purchaser at public sale made for arrears of Government revenue, having allowed 20 years to elapse before bringing the suit. But it is not necessary in every case for a purchaser to rest on his privileges as such. He has the rights of an ordinary *zumeendar* by descent, or, private purchase, as well as his special privileges as auction purchaser; and it depends entirely on the nature of the tenure he wishes to re-assess, whether he should plead those privileges or not. That will be necessary only when the tenure may be held on such terms that, but for his being an auction purchaser, he could not touch it. I think Mr. Dick has not correctly applied the rule laid down in Section 49. That section, as well as Section 51, relates to *talooks* then in existence; and whenever the rights of *zumeendars* or *talookdars* in regard to such *talooks*

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may be matter of dispute, the question will be disposed of under the rules contained in those sections respectively—and I repeat, that, if a tenure be found to be such as the *zumeendar* of the time being might have re-assessed, you make Section 29, Regulation XI. 1822, an impudent deception, if you bar the auction purchaser's right to do so *now*, merely under the law of limitations. The rent of land, liable by the tenure under which it is held to a variable assessment, is an annually recurring cause of action; and it may as fairly be argued, that if I rent a house from month to month, and the proprietor allow me to continue to do so for twelve years, he cannot enhance the monthly rent. If the nature of the holding do not protect it from enhancement, no length of time can convey that which does not belong to it."

Mr. Rattray.—"I have only these minutes before me; and they do not show on what tenure the occupant of the land holds possession; and without knowing this, it is difficult to say what his rights are. I presume he was found in possession by the sale-purchaser at the time of sale, 20 years ago,—and has been allowed to remain so since, undisturbed till this demand was made for enhancement of what he paid before. But he must have had a *pottah*, or a something from the former *malik;* and if this expressly stated terms, those terms must be abided by. I gather from what Mr. Dick states, that he was considered a *mokurrurreedar* at a *fixed rent*. If really so, I should say, nothing could touch him (independently of the law of limitation); but if he stands only on his *possession* for 20 years, and has nothing to show else, he is *not* protected against the demand now made against him."

REPORTS

OF

SUMMARY CASES

DETERMINED

IN THE

Court of Sudder Dewanny Adawlut.

APPROVED BY THE COURT.

REPORTS FOR 1845.

CALCUTTA:

BENGAL MILITARY ORPHAN PRESS.

1846.

AN INDEX

TO

THE PRINCIPAL MATTERS.

RAIEE HURREE KISHEN, PETITIONER.

1845.

February 3.

Reasons preferred by a defendant for the dismissal of a regular suit, cannot be urged in a miscellaneous petition, but should be contained in the answer to the plaint.

THIS was an appeal from an order of the judge of zillah Tirhoot, dated 21st September 1844, rejecting his petition to have a suit of Raja Putnee Mull against him thrown out, because former suits had been disposed of connected with the same cause of action.

By the Court (Mr. Reid): "The petitioner's pleas should be given in his answer to the plaint, not in a miscellaneous petition; and the judge was quite right in rejecting the application."

Order accordingly.

RAM NARAIN BHUTTACHARGE, PETITIONER.

1845.

February 10.

Held that an appeal *in formâ pauperis* may be preferred from the decision of a collector under Clause 4, Section 30, Regulation II. 1819.

THIS was an appeal from an order of the judge of West Burdwan, dated 29th April 1844, refusing to allow the petitioner to appeal *in formâ pauperis* from a decision passed under Clause 4, Section 30, Regulation II. 1819.

In a letter addressed to the Court in explanation, the judge assigned as his reasons for rejecting the petitioner's application, that he was not aware of any precedent showing that such an appeal had ever been allowed, and that the Regulations were silent on the subject. He considered that the framers of Regulation II. 1819, apparently did not contemplate such appeals, for they fixed the stamp duty at only one rupee, so as to admit of appeals from all classes;—and, although the Sudder Court had subsequently, by Construction No. 987, increased the value of the stamp, no instructions had been issued regarding pauper appeals.

The judge's explanation was submitted for the opinion of his colleagues by Mr. Reid, together with the following minute, which he had recorded:—"Clause 1, Section 12, Regulation "XXVIII. 1814, allows a pauper appeal from every original "decision. The decision of the collector is, to all intents and "purposes, an original decision; therefore I conceive the appeal "may be heard *in formâ pauperis*."

The Court at large concurred with Mr. Reid, who accordingly passed orders reversing that of the zillah judge.

REMARKS.

The report of the collector, under Clause 6, Section 30, Regulation XI. 1819, on a case referred by a court of judicature, is "a summary judgment," (see Circular Order No. 95, dated August 30th 1833,)—and differs from his "final judgment" under Clause 4, which is subject to an appeal to the civil court by Clause 7 of the enactment cited.

1845.

SHEIKH HADEE ULLEE AND OTHERS, PETITIONERS.

February 18.

It is not necessary to have corruption or partiality on the part of arbitrators proved by evidence, when it may be proved by the records of the case, as in the instance of contradictory awards by the same arbitrators.

THIS was an appeal from an order of the judge of Tirhoot, dated 6th September 1843.

A dispute regarding the boundary of *mouza* Kungore, the property of the petitioners, and of *mouza* Kumtole, the property of Maha Rajah Chuttur Sing and Lalla Durbarry Lall, had been pending in the *foujdarry* court. With the concurrence of both parties, and according to the orders of the *foujdarry* court, Karee Rawut *ryot* and inhabitant of *mouza* Kungore, and Baluk Rawut *ryot* and inhabitant of *mouza* Kumtole, were nominated arbitrators. On the 1st Falgoon 1244 Fuslee, or 5th March 1838, they decided the case, and forwarded a copy of their decision to each party, and a third copy was forwarded to the magistrate. On their award being objected to, the magistrate ordered the petitioners to file an application for its execution in the civil court; accordingly, the petitioners applied to the civil court, on which the opposite party filed objections against the award. The judge of the zillah court rejected the petitioners' application, and ordered the case to be struck off the file, in consequence of the depositions of the witnesses not having been taken on oath, and owing to the decision by the arbitrators being passed in the absence of the parties, and the award being contrary to a former decision of the arbitrator Baluk Rawut, passed in another case.

The petitioners, being dissatisfied with the above order, preferred an appeal to the Court of Sudder Dewanny Adawlut, when Mr. J. R. Hutchinson, on the 26th June 1838, reversed the order of the lower court, and directed that the award of the arbitrators should be carried into effect, provided there appeared no corruption on their parts.

The zillah judge, on the 5th January 1839, in execution of the above order, restored the case to its former number, and passed an order to the effect that Baluk Rawut, the arbitrator, in a former case of dispute regarding boundaries, had, on the 6th Pous 1236 Fuslee, given an award in which lands now assigned to Kungore, were shown to belong to mouza Kumtole; moreover on calling for Baluk Rawut, he did not appear. Accordingly the judge, feeling satisfied of the arbitrators' partiality, again rejected the petitioners' application for the execution of the award.

Afterwards, the judge, being doubtful of his construction of the law (section 9, Regulation XVI. 1793) referred to the Court to be allowed, if deemed proper, to review his judgment. His letter, dated 10th January 1839, was as follows.

" In referring to the rough draft of an order passed by me, on a case brought forward under Regulation VI. of 1813, and which was returned to this court by the orders of the late Mr. Hutchinson, with a precept, dated the 18th July 1838, I find that I have possibly mistaken the intent of the order passed in the case, (which directed me to re-hear the suit, because evidence to corruption or partiality had not been adduced,) and have, on the evi-

dence alone of two contradictory awards, by the same arbitrator Baluk Rawut, ruled that partiality was established, without going into extraneous evidence; but, to avoid error or *misconstruction*, I now beg to lay the papers before the Court, and to solicit permission to review this last order of mine of the 5th instant, if the Court should still consider that it is absolutely and indispensably necessary to require the testimony of two witnesses to prove such a point as partiality in an arbitrator, when two of the same arbitrators' awards are on record, the one contradicting the other, and declaring the same lands to belong first to one and then to the other village. My own opinion is that the awards themselves, and the maps or plans, are the best tests of this fact, and that partiality may well be held established, in one of the instances, when these are found to differ. Indeed, I should say they were the best proofs; for, without absolute proof of corruption, and receipt of money, this partiality could never so well be established, for it must rest a secret in the party's own breast; and I also consider that the law, as to witnesses, in Section 9, Regulation XVI. of 1793, has reference to corruption alone, the other hardly being so susceptible of proof by the testimony of witnesses. Still I would waive such opinion in deference to the Court, should they put a different construction on the intent of this law, as to the indispensability of proof by witnesses of partiality, and therefore request their orders or sanction to review my decision of the 5th instant."

On the 1st November following, the Court at large sanctioned a review of judgment; but declared the evidence of witnesses to be unnecessary to prove corruption and partiality if they could be otherwise established. At the same time the judge's attention was directed to the Circular Order No. 51, dated 24th February 1816. Accordingly the case was restored to its original number in the zillah court, and without taking the evidence of witnesses regarding bribery and partiality on the part of the arbitrators, the zillah judge, for the same reasons as before, on the 6th September 1843, suspended the execution of the award of the arbitrators, and ordered the case to be struck off the file. Upon appeal preferred by the petitioners, the Sudder Court confirmed the zillah judge's order.

GUNSA RAM DOBEH AND OTHERS, PETITIONERS. 1845.

February 19.

Held, that the 8 days' notice required by Sect. 12, and the proceedings to be recorded under Sect. 10, Reg. XXVI. 1814, must be repeated, if the parties to a suit be allowed to file any pleadings subsequently to the above provisions of the law having been once already attended to.

THE collector of zillah Shahabad instituted a suit to recover from petitioners (defendants) Rs. 6494-7-4½, *waasilat* for *mouzas* Jugdeespore and Luhna Domree, *pergunnah* Bojepoor, a *maafee mehal*. The principal sudder ameen, Moolvee Syud Munowur Ali Khan, on the 8th December 1843, passed a decree in favor of Government, in the absence of the petitioners. They

consequently, on the 7th March 1844, preferred a summary appeal to the Sudder Dewanny Adawlut.

As it did not appear from the principal sudder ameen's decision that he had proceeded regularly, he was called upon for an explanation. From his explanation, dated the 19th April 1844, it appeared that due notices having been issued, calling on the defendants to appear, the usual 8 days' notice was issued on the 7th August 1843; and, on the 28th August 1843, the *roobacaree* required by Section 10, Regulation XXVI. 1814, was recorded. On the 29th August the defendants appeared and filed their answer. On the 31st August, plaintiff was required to file his reply, which he did on the 29th November.* After 10 days, i. e. on the 8th December 1843, the case was brought forward, and, the defendants not being present, no rejoinder nor proofs were demanded from them. The principal sudder ameen did not think the issue of a fresh notice necessary, but decided the case on that date in favor of the plaintiff.

By the Court (Mr. Reid): "I am of opinion that the notice under Section 12, and the *roobacaree* of the 28th August 1843, under Section 10, Regulation XXVI. 1814, must be considered as nullified by the permission to the defendants to answer and the plaintiff to respond; and that on the reply of the collector being filed a proper period should have been allowed to the defendants to file their rejoinder; and, on the expiration thereof, the 8 days' notice should have issued; and, after the expiration of that term, a fresh *roobacaree* written under Section 10, Regulation XXVI. 1814; and that that not having been done, the decision of the principal sudder ameen must be considered as defective. I therefore, under Clause 2, Section 2, Regulation IX. 1831, annul the decision of the principal sudder ameen, and enjoin him to restore the case to the file, and proceed to try it in the manner above indicated."

1845.

KALEE SHUNKER BUXEE AND OTHERS, PETITIONERS.

March 18.

It is not necessary to issue, to the new officer, fresh notice in a case to which the receiver of the Supreme Court may be a party, on change of the official incumbent.

THIS was an appeal from an order of the judge of zillah Backergunge, dated 14th December 1844, dismissing their appeal against a decision of the principal sudder ameen in favor of Brij Kishore Sein and others. The appeal had been thrown out in consequence of the lapse of six weeks, after the death of Mr. R. Vaughan, receiver of the Supreme Court, one of the defendants, without any application to have notice served upon his successor.

By the Court (Mr. Reid): "I do not consider this a sufficient reason for throwing out the case. The receiver's office still continued, and I hold it unnecessary to issue any notice. If the official individual die, it is the duty of the successor to attend and carry on cases in which he is officially concerned."

The judge's order was accordingly reversed.

* The period of six weeks was exceeded on account of the intervention of the Dusserah holidays.

BISHEN SOONDUREE DIBEA, PETITIONER.

1845.

April 21.

The filing of a second supplementary plaint, although unauthorised by law, is no ground of nonsuit.

THIS was an appeal from an order of the additional principal sudder ameen of 24-Pergunnahs, dated 2d April 1845, throwing out her suit against Cazee Gholam Ghyasooddeen and others, because, after filing one supplementary plaint to include Thakoor Das Rai and others, amongst the defendants, which was allowed, she filed a second one to add the name of Ram Rai to their number.

The Court (Mr. Reid): "The regulations do not lay down nonsuit as a penalty for giving in a supplementary plaint. The court should have merely rejected it, and tried the case as between the parties present, leaving the plaintiff to suffer the consequences of her neglect in not naming all the defendants at the proper time."

Order reversed.

A. H. ARRATOON, PETITIONER.

1845.

April 21.

Process of arrest under Section 4, Regulation II. 1806, taken out against a person when within the jurisdiction of the court issuing it, may be served on him beyond it.

THIS was an appeal from an order of the principal sudder ameen of Dacca, dated 30th December 1844, who refused to issue a warrant of arrest against D. F. M. Beglar, under Section 4, Regulation II. 1806, considering himself precluded from doing so by Construction 888, as the defendant had proceeded to Calcutta, and was no longer within the jurisdiction of the Dacca court.

By the Court (Mr. Reid): "If the defendant was within the jurisdiction at the time the process was first resorted to, the principal sudder ameen will issue his warrant to the sheriff to arrest him."

Order accordingly.

BYJNATH BOSE, PETITIONER.

1845.

April 22.

Right of succession cannot be decided in a summary manner, except under Acts XIX. and XX. of 1841, or when the heirs of deceased parties to suits are called upon to appear.

THIS was an appeal from so much of an order of the officiating judge of 24-Pergunnahs, dated 4th July 1843, as summarily declared the will of one Gopeenath Bose, whose death occurred on the 12th April 1842, produced by his widow Urnapoorna, on the 9th March 1843, to be proved.

Her statement, on the occasion, was, that her deceased husband had, during his illness, on 17th Phalgoon 1248, corresponding with 27th February 1842, executed a will that his widow should adopt a son, and that she should have possession of his estate as guardian. He subsequently died; she therefore prayed that proof of the above might be taken.

The petitioner, who was paternal uncle of the deceased, stated, in opposition to her claim, that the will produced by her was forged; that his nephew had committed suicide by shooting himself; that he had made no will; and that the widow's application to the court, not having been preferred within six months of her husband's decease, Act XIX. 1841 could not be put in force.

The officiating judge considered the will to be proved by the evidence of the witnesses; but, declining to pass any order upon it summarily, he recognised the widow as representative of her deceased husband without reference to it. As he considered the case to have no connection with Section 14, Act XIX. 1841, the plea of the uncle, founded thereupon, was declared inadmissible.

The present petition was an appeal to the Sudder Dewanny Adawlut, objecting to the will having been summarily declared to be proved.

On the 30th October 1843, the case was taken up by Mr. Reid, who, with reference to the provisions of Regulation V. of 1799, which requires a regular suit to be instituted on occasions of disputed succession, and to the officiating judge's declaration that Act XIX. of 1841, had nothing to do with the case, called upon him to explain under what regulation the heirship of Urnapoorna to the deceased had been tried, and she had been made his representative; and why the will was summarily pronounced to be proved.

In reply, the officiating judge, on December 2d 1843, represented his order to be founded on no regulation, but on the practice prevailing in the zillah, as ascertained from the officers and pleaders of the court.

By the Court (Mr. Reid): "I am of opinion that such practice is highly irregular; and that the judge should be directed not to interfere with any cases of succession, except summarily under Acts XIX. and XX. of 1841, or when a regular suit is instituted under Regulation V. 1799."

The Court at large, concurring with Mr. Reid, with the proviso that the question of heirs to deceased parties to suits might be summarily entertained, the order of the officiating judge, dated 4th July 1843, was reversed, and the enquiry into the validity of the will was declared to be null and void.

1845.

A. H. ARRATOON, PETITIONER.

May 5.

An answer, filed by the *vakeel* of a defendant in a suit, himself absconding or not furnishing security under Regulation II. 1806, is not to be attended to.

THIS was an appeal from an order of the principal sudder ameen of Dacca, dated 25th February 1845, allowing D. F. M. Beglar to appeal by *vakeel* and file an answer, although he had not given security for his appearance under Regulation II. 1806.

By the Court (Mr. Reid): "There is nothing in Regulation II. 1806, to prevent a party from appearing by *vakeel;* but, if a party, failing to furnish security when called upon, can file his answer and defend the suit, it would altogether set aside and nullify the whole process. The principal sudder ameen will not therefore act upon the answer, until the defendant give security or deliver himself up."

Order accordingly.

SUPERINTENDENT OF SALT CHOKEES OF BULLOOAH, PETITIONER.

1845.

May 12.

The civil courts cannot be expected to execute awards which they consider illegal.

THIS was an appeal from an order of the judge of Chittagong, dated 16th September 1843, refusing to issue process under Section 29, Act XXIX. 1838, to realize a fine imposed *exparte* upon certain individuals for chur-scraping.

Certain parties residing in the neighbourhood of the salt churs abandoned by the agency, were in the habit (as stated by the superintendent) of scraping the churs and carrying off the mud to manufacture salt. The preventive peons stated this on oath to the superintendent, who summoned the parties to defend themselves; this they omitted to do,—and he then proceeded, according to law, to try the complaint of his emissaries, and fined the parties for chur-scraping. As the judge considered chur-scraping to have been declared to be no infraction of the salt laws by the Construction of the Court No. 1211, dated 10th May 1839, he looked upon the warrant of the superintendent to be in excess of his authority, and as such did not deem it incumbent on him to give it effect.

On appeal to the Sudder Dewanny Adawlut, the Court (Messrs. Rattray, Reid, and Dick) ruled that the civil courts cannot carry into execution orders of a salt agent, which have been determined to be illegal.

Appeal rejected.

KUMMUL KISHORE GOH, PETITIONER.

1845.

June 2.

The issue of notice to heirs of defendant or respondent, deceased, to attend, and not proof of their heirship, is required from the opposite party.

THIS was an appeal from an order of the judge of zillah Backergunge, dated 3d March 1845, dismissing the petitioner's appeal against the decision of the principal sudder ameen, in a case in which he had sued Kalachand Race and others for defamation.

The judge had dismissed the appeal, because the petitioner had not proved who were the heirs of two of the defendants deceased. Notice to them generally to attend had however been issued by him.

By the Court (Mr. Reid): "The petitioner did all that was "required from him. I therefore reverse the judge's order and "direct the restoration of the appeal to the file."

Ordered accordingly.

BAMUN DAS MOOKURJEE AND OTHERS, PETITIONERS.

1845

July 3.

If the existence of a will be disputed between the heirs of a party deceased, security may be demanded under Sect. 4, Reg. V. 1799.

THIS was an appeal from an order of the principal sudder ameen of Nuddea, dated 2d October 1844.

The petitioners were defendants in a case, instituted against them by Tarinee *alias* Seamunee Debia, for the recovery of the property of her deceased husband Chunder Bhoosun Mookurjee, which the defendants alleged he had given by will to Mothoranath Mookurjee, his son by adoption, of whom Bamun Das, the father, was, by the will, constituted the guardian.

The plaintiff, whose action was brought to contest the will, had applied to the principal sudder ameen to demand security from the defendants under Section 4, Regulation V. 1799, and her application being complied with, the present appeal was preferred to the Sudder Dewanny Adawlut.

By the Court (present Messrs. Tucker, Reid, and Barlow): "After full consideration the Court are of opinion that, with reference to Section 4, Regulation V. 1799, if the existence of the will be disputed by the heirs, the case must be considered as one of an intestate, and dealt with accordingly."

The order of the principal sudder ameen, calling for security, was therefore confirmed; but, as the defendants had urged that the value of the property had been over-stated by the plaintiff, the principal sudder ameen was directed to decide upon its value, and then to demand security to that amount.

1815.

SUDDER BOARD OF REVENUE, PETITIONER.

August 12.

Diet allowance for a debtor, confined on account of several decrees obtained against him by one creditor, need not be deposited in each case.

THE judge of Dinagepore, on a reference from the commissioner of the Bhagulpore Division, to know whether, in the event of a plaintiff's applying for the execution of two or more decrees against the person of an individual defendant, it was necessary to deposit the prescribed amount of diet allowance for the defendant's maintenance in each case, replied that the deposit prescribed in Section 2, Regulation VI. 1830, was necessary in each case, whatever number of decrees there might be against the debtor; but that, when confined, he would not be entitled to any more than if there had been only one decree against him.

This opinion was brought to the notice of the Sudder Dewanny Adawlut, in the course of an appeal, preferred from an order of the judge, dated 3d January 1814, by which he had directed the Government pleader to pay the *tullubana* of two peons, to execute two different decrees against the same person.

After a reference to the judge, the Court (present Messrs. Rattray, Reid, and Dick) informed him that *tullubana* is intended for the remuneration of the *peada* for seizing a person; and that, if there be two warrants against the same debtor, one *tullubana* is sufficient. Nor is there any reason why, if a process of arrest is to be issued against a debtor on ten different decrees, more subsistence money should be deposited than would be necessary if there were but one decree: since the deposits being made monthly, in advance, the debtor could not obtain his release by merely satisfying one decree, but would be detained in jail till he had liquidated the whole of the several sums decreed against him—the creditor not failing always to lodge diet money in proper time.

The judge's order appealed against, was, at the same time, reversed.

BOARD OF CUSTOMS, SALT, AND OPIUM, PETITIONERS.

1845.

August 12.

The principle of Section 110, Regulation X. 1819, is that imprisonment can only be awarded in commutation of fine.

THE following construction of Section 110, Regulation X. 1819, arose out of an appeal from an order of the judge of Tipperah, dated July 3d, 1843, throwing out certain cases of execution of decrees against persons convicted of offences against the salt laws.

The principle of Section 110, Regulation X. 1819, was held to be that imprisonment can only be awarded in commutation of fine. When therefore a party has suffered the full period of imprisonment, adjudged for non-payment of fine, or an order is passed for imprisoning him, all proceedings against his property for the realization of the amount should cease. But if the judge, agreeably to the request of the salt agent, proceeds to attach property, with a view to realization of the fine, he cannot simultaneously pass an order for the confinement of the party. In the event, however, of his not being able to realize the fine imposed in full, he may confine the party for the entire period of imprisonment in commutation.

BHOBUN MYE DEBEEA CHOWDRYN, PETITIONER.

1845.

Sept. 22.

A party to an action cannot be called upon to point out the witnesses named by the opposite side.

THIS was an appeal from an order of the principal sudder ameen of Mymensing, dated 28th July 1845, in the case of Ras Beharee Koor *versus* the petitioner, requiring her to produce the witnesses named by the plaintiff, who were said to be the petitioner's own servants.

By the Court (present Mr. Reid): "The principal sudder ameen has no authority to pass such an order. If the plaintiff find difficulty in getting the subpœnas served on his witnesses, he must exert greater activity."

Order reversed.

BUNWAREE LALL, PETITIONER.

1845.

Sept. 23.

In the event of two or more defendants filing their answers to an action separately, the plaintiff, unless he obtain permission to the contrary, must reply to each within six weeks from the date of its presentation; otherwise he will incur the penalty of default.

THIS was an appeal from a decision of the principal sudder ameen of Tirhoot, dated 22d July 1845, dismissing, on default, his suit against Ajodya Pershad Nurayun Sing and Haronee Ram, to set aside a deed of sale. The "answer" of Haronee Ram had been filed on the 17th February, and that of Ajodya Pershad Nurayun Sing on the 18th March 1845. The "reply" of the plaintiff to both was presented on the 21st April. The defendants, after the case had been allowed to go on for some time, claimed and obtained its dismissal on default, in consequence of the answer of Haroonee Ram not having been replied to within six weeks after it was filed.

An appeal against the order to such effect was thereupon preferred to the Sudder Dewanny Adawlut.

By the Court (present Mr. Reid): "The petitioner pleads that he waited till the answer of Ajodya Pershad Nurayun should be filed. This is not a sufficient excuse. Had he wished to await the filing of that answer, he should have petitioned the court for more time."

Petition rejected.

1845.

GOURMOHUN SHAW, PETITIONER.

Novr. 17.

If security for costs be demanded from an appellant by a court of appeal in its discretion under Act III. 1845, the reasons for the same should be recorded.

THIS was an appeal from two orders of the judge of Mymensing, dated 16th August and 4th September 1845, throwing out the petitioner's appeal from the decision of the sudder ameen, in default of furnishing security for costs.

By the Court (present Mr. Reid): "The judge, unless special cause to the contrary existed, should have exercised, under Act III. 1845, his discretion in dispensing with security for costs, and ought not to have rejected the appeal. No special cause for the demand of security for costs having been recorded, the judge will restore the appeal to the file."

Order reversed.

1845.

MUSST. EMAM BANDEE, PETITIONER.

Novr. 24.

If Government be a co-defendant in a suit, the plaintiff need not, after filing the plaint, take any steps in prosecution of the case, till the answer of Government be given in.

THIS was an appeal from a decision of the principal sudder ameen of Tirhoot, dated 29th July 1845, throwing out her action against Musst. Burkutoonissa and Government, for Co.'s rupees 33,468-5-6-8, because more than six weeks had elapsed between the filing of the answer of Musst. Burkutoonissa, one of the defendants, and the petitioner's replication thereto—although six weeks had not elapsed since the collector had put in his answer.

On appeal to the Sudder Dewanny Adawlut, the case was brought before Mr. Reid, who laid the following minute before his colleagues for their opinion.

"On the 29th July 1845, Neamut Ali, the principal sudder ameen of Tirhoot, threw out this case under Act XXIX. of 1841, because more than six weeks had elapsed between the filing of the answer of Burkutoonissa (on 7th June 1844,) and the filing of the *juwab ool juwab* (on 17th June 1845.) It was not till the 2d June 1845, that the petition of plaint (which the commissioner had requested to see in original) was returned by that officer; and, on the 30th June 1845, the Government pleader put in a petition by way of answer. The object of the reference to the revenue authorities, under Regulation II. 1814, is to afford Government an opportunity, after the necessary enquiries, of ordering plaintiff's demand to be satisfied, if they think it just, or leaving him to prosecute his claim according to law, should they doubt or not acknowledge the justice of the demand. Till therefore the revenue authorities have given their final reply, as required by Clause 4, Section 3, Regulation II. 1814, the suit cannot, in my opinion, be considered as *formally instituted*. Till this was done

in the present case, there seems to me to have been no necessity for the plaintiff to have replied to Burkutoonissa's answer. Until the commissioner's refusal to comply with her demand had been received, she could not possibly know that it would be refused. I therefore think that she need not have put in the reply so soon as she did—and that, therefore, her suit ought not to have been thrown out on that account. Had she committed default of six weeks after that time, it would properly have been liable to dismissal. I would reverse the decision of the principal sudder ameen, but would first wish to have the opinion of my colleagues."

Mr. Tucker remarked: "Until the reply of the Board of Revenue (now the commissioner) shall have been received, there is no suit before the Court—only a mere petition. Clause 4, Section 3, Regulation II. 1814, expressly says: 'and such communication shall be deemed sufficient authority for the *formal institution* and trial of the suit.'"

In this opinion Messrs. Rattray and Dick also concurred. The decision of the principal sudder ameen was therefore reversed, and the case restored to the file.

SHAMA SOONDREE DASEE, PETITIONER.

1845.

Dec. 9.

An action is not liable to nonsuit, from the difference between the value stated and the proper value of the property sued for affecting the stamp duty on the petition of plaint, unless the value be understated in the proportion of 10 per cent.

THIS was an appeal from an order of the additional judge of Hooghly, dated 22d August 1845, nonsuiting their appeal, in consequence of their having estimated their suit at Co.'s rupees 2,923-3-2, instead of at Co.'s rupees 3,014-5-4.

In the one case the stampt paper required for the petition of plaint being of the value of 100 rupees, and in the other of 150 rupees, the judge nonsuited the appellant, on account of the stamp revenue being affected by the under-statement of value.

On appeal to the Sudder Dewanny Adawlut, the Court (present Mr. Reid) held that, as the difference between the two sums was only 91-2-12, and did not amount to 10 per cent. on the value sued for, the judge's order should be reversed, as opposed to clause 4 of the note to article 8, Schedule B, Regulation X. 1829, and the appeal restored to the file.

Ordered accordingly.

LALOONISSA BEGUM AND DOWLUT KHATOON, PETITIONERS.

1845.

Dec. 15.

The possession of property by the husband is no bar to the admission of a suit *in formâ pauperis* on the part of the wife.

THE judge of Dacca, on the 15th September 1845, refused the petitioners permission to sue *in formâ pauperis*, their father Hussynoodeen, to recover Company's rupees 32,355-9-5-2, the dower of their mother. The reasons assigned were, that the first had not sued for four years after she came of age, and that the husband of the latter was a man of wealth.

On appeal to the Sudder Dewanny Adawlut, the Court (present Mr. Reid) held both reasons to be insufficient for the rejec-

tion of the prayer of the petitioners; particularly the second, as Dowlut Khatoon could not claim from her husband the means of carrying on the suit.

The order of the zillah judge was accordingly reversed.

1845.

GUNGA SAUGUR SIRCAR, PETITIONER.

Dec. 16.

It is no ground of nonsuit that the value of the property has been over-estimated.

THE petitioner had sued Kheturnath Seel, in the court of the principal sudder ameen of Hooghly, for the possession of a *putnee talook*, and had laid his claim at Co.'s rupees 1,676, being 751 rupees the amount of purchase-money, and 925 rupees the *sudder jumma* for one year. On the defendant objecting to the valuation, an *ameen* was deputed by the principal sudder ameen to ascertain the proper amount, who reported it to be 1,700 rupees. The objections of the defendant were accordingly over-ruled, whereupon he appealed to the zillah judge, who considered that the suit ought to have been laid at only 751 rupees. The principal sudder ameen, therefore, nonsuited the plaintiff.

From the order of the zillah judge, which was dated the 14th May 1845, an appeal was preferred to the Sudder Dewanny Adawlut.

By the Court (present Mr. Reid:) "The petitioner sues at rupees 1,676, being 751 rupees the price, and rupees 925 one year's *sudder jumma*. The defendant says he has too highly estimated the value. This is no ground of nonsuit. Had the plaintiff laid his suit too low, in the proportion of 10 per cent., he would have been liable to nonsuit. Let the suit go on, and the value be determined. If the plaintiff be cast, he will have to pay costs on the full amount at which he has laid his suit. If he get a decree, the defendant will have to pay costs only in proportion to the ascertained value."

Ordered accordingly.